# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1958 / 1959

## No. 127 /

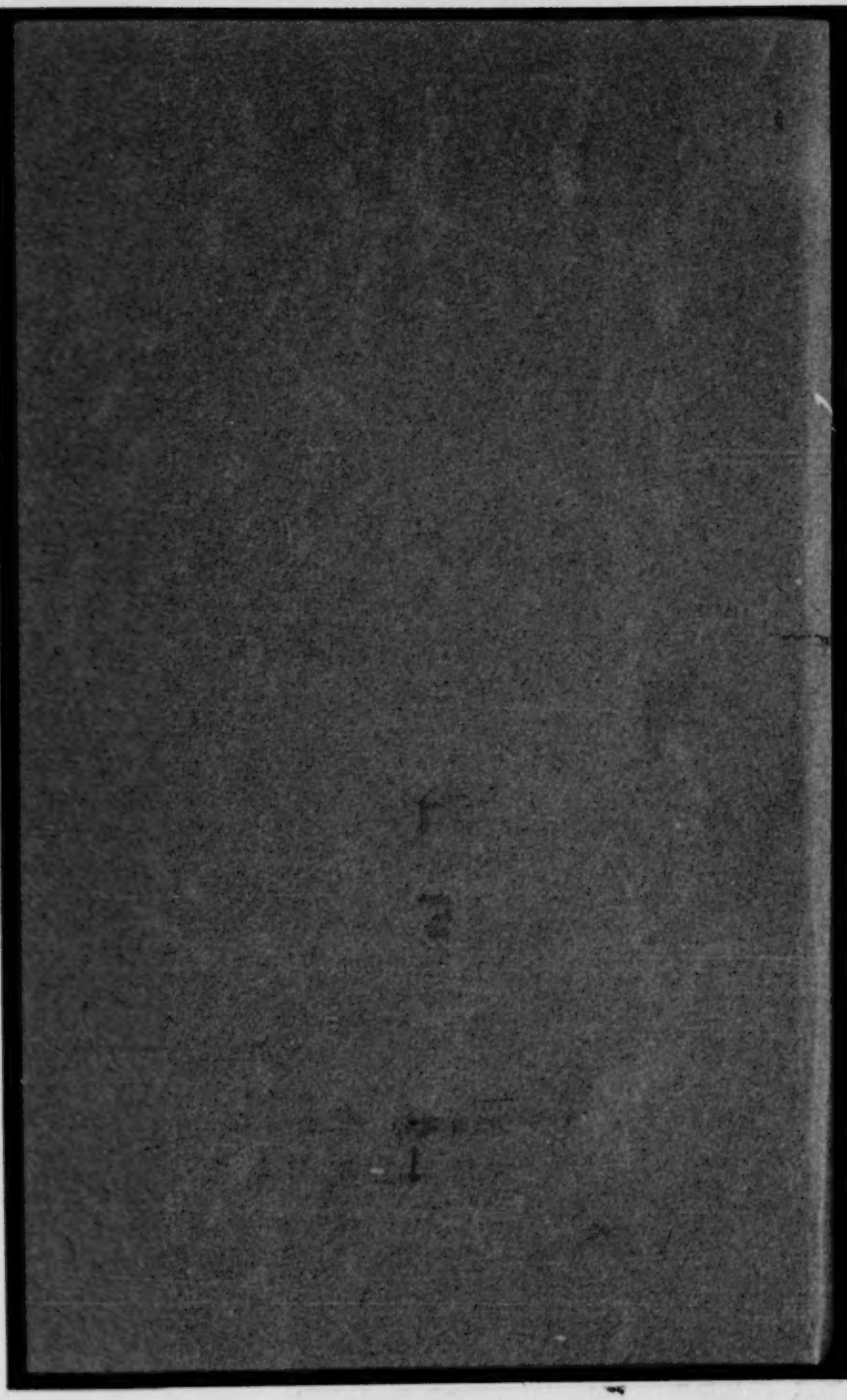
ROBERT AQUILINO AND JOSEPH SPERO, d/b/a HOME MAINTENANCE COMPANY, AND COLONIAL SAND AND STONE CO., INC., PETITIONERS,

*vs.*

UNITED STATES OF AMERICA, ADA BOTTONE, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 20, 1958
CERTIORARI GRANTED FEBRUARY 24, 1959



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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1958**

## No. 132

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

**IN THE NEW YORK SUPREME COURT**
**APPELLATE DIVISION—SECOND DEPARTMENT**

---

Action No. 1

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

—against—

UNITED STATES OF AMERICA, Defendant-Appellant,

—and—

FLEETWOOD PAVING CORPORATION, Defendant,

—and—

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

---

Action No. 2

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

—against—

UNITED STATES OF AMERICA, Defendant-Appellant,

—and—

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

—and—

HOME MAINTENANCE COMPANY, Defendant-Respondent.

---

STATEMENT UNDER RULE 234

Robert Aquilino and Joseph Spero, doing business as Home Maintenance Co., began Action No. 1 by serving fol. 2] copies of a summons and complaint on Ada Bottone, Fleetwood Paving Corp. and on Colonial Sand & Stone Co., Inc., and filing the originals in the New York Supreme

Court, Westchester County, on or about June 15, 195
Home Maintenance Co. filed a notice of the pendency
Action No. 1 on June 12, 1953.

Colonial Sand & Stone Co., Inc., instituted Action No.
in the Supreme Court, Westchester County, on June 4, 19
in order to foreclose a mechanic's lien; on the same date
filed a lis pendens. Copies of the summons and complai
were served on Ada Bottone and Mario's Miramare Re
taurant on July 8, 1953, and on Messrs. Aquilino and Sper
doing business as Home Maintenance Co., on July 9, 195

Ada Bottone, owner of Mario's Miramare Restauran
filed an answer in both actions. Fleetwood Paving Cor
appeared in both actions but never filed an answer in eithe
Home Maintenance Co. and Colonial Sand & Stone Co., In
stipulated that each will be deemed to have denied th
material allegations of each other's complaint. Later, a
counsel stipulated that both cases would be heard and/
tried together.

On June 10, 1954, Ada Bottone moved in both actions
substitute the United States for herself upon the deposit
$2,200. Justice Arthur D. Brennan of the Supreme Cou
of Westchester County granted Ada Bottone's motion an
[fol. 3] entered an order for substitution in both actions
July 28, 1954.

The requirements of Justice Brennan's order were ca
ried out and the United States was made a party defenda
in Actions No. 1 and No. 2. The United States served an
filed answers in Actions No. 1 and No. 2 on or abo
September 30, 1954.

In February of 1955, Home Maintenance Co. and Coloni
Sand & Stone Co., Inc., moved and cross-moved respectivel
for summary judgment; and the United States then cros
moved for summary judgment. All motions were hea
together before Justice Brennan, who filed an opinion
March 17, 1955.

Justice Brennan granted the motion of Home Maint
nance Co. and the cross-motion of Colonial Sand & Sto
Co., and denied the cross-motion of the United State
Under the opinion, Home Maintenance Co. and Coloni
Sand & Stone Co., Inc., were to share "pari-passu" in th
$2,200. deposited into the Court by Ada Bottone.

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Upon proper notice an Order and Judgment was settled and signed by Justice Brennan, and entered in both cases by the Clerk of the Court on March 28, 1955.

The United States filed a notice of appeal from the order and judgment of Justice Brennan on April 27, 1955.

Throughout this action counsel for Home Maintenance Co. has been Charles S. Friedman; for Colonial Sand & [fol. 4] Stone Co., Inc., Jacob I. Goodstein. Ada C. Bottone and Fleetwood Paving Corp. have been represented by Cribari, Scapolito & Solinger. The United States was initially represented by J. Edward Lumbard, then United States Attorney for the Southern District of New York. Mr. Lumbard's successor, Lloyd F. MacMahon, became the attorney for the United States for a period; and, presently, United States Attorney Paul W. Williams is its attorney in this case.

There have been no changes of parties or attorneys since the commencement of these cases, except those indicated in this statement.

---

[fol. 5]

IN THE SUPREME COURT OF NEW YORK
WESTCHESTER COUNTY

---

Action #1

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of HOME MAINTENANCE CO., Plaintiffs,

—against—

UNITED STATES OF AMERICA, FLEETWOOD PAVING CORP., and COLONIAL SAND AND STONE CO., INC., Defendants.

---

Action #2

COLONIAL SAND AND STONE CO., INC., Plaintiff,

—against—

UNITED STATES OF AMERICA, MARIO'S MIRAMARE RESTAURANT, HOME MAINTENANCE CO., and FLEETWOOD PAVING CORP., Defendants.

---

NOTICE OF APPEAL—April 27, 1955

Sirs:

Please Take Notice that the United States of America, the defendant in both Action No. 1 and Action No. 2 above, hereby appeals to the Appellate Division of the Supreme Court in and for the Second Judicial Department from the order and judgment of this Court, signed by Justice Arthur D. Brennan and dated March 28, 1955, which order granted the motion of plaintiffs in Action No. 1 for summary [fol. 6] judgment and granted the motion of the plaintiff in Action No. 2 for summary judgment and denied the cross-motion of the United States for summary judgment, and which judgment directs the County Clerk of Westchester County to pay over the sum of $2,200. to the plaintiffs in the above-entitled actions, and from each and every part of the aforesaid order and judgment.

Dated: New York, N. Y., April 27, 1955.

Yours, etc.,

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant, United States of America, Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

To: Jacob I. Goodstein, Esq., Attorney for Defendant, Colonial Sand and Stone in Action No. 1 and for Plaintiff in Action No. 2, 21 East 40th Street, New York, N. Y.

[fol. 7] Cribari, Scapolito & Solinger, Esqs., Attorneys for Defendant, Fleetwood Paving Corp., 100 Stevens Avenue, Mt. Vernon, New York.

Charles S. Friedman, Esq., 10 Fiske Place, Mt. Vernon, New York, Attorney for Plaintiffs in Action No. 1 and Defendant Home Maintenance Co. in Action No. 2.

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fol. 8]

IN THE SUPREME COURT OF NEW YORK
WESTCHESTER COUNTY

ORDER AND JUDGMENT APPEALED FROM—March 28, 1955

'resent—Hon. Arthur D. Brennan, Justice.

A motion having been duly made herein by the plaintiffs
1 Action No. 1 above entitled, for summary judgment in
avor of said plaintiffs striking out the Answer of the
efendant, United States of America, and dismissing the
ross-claim set forth in said Answer, and further declaring
iat the lien of the plaintiffs in Action No. 1 above entitled,
a valid lien against the premises described in the com-
laint in said Action for the sum of Fourteen Hundred
$1400.00) Dollars, and declaring that the lien of said plain-
ffs attach to the moneys heretofore deposited by a former
efendant, Ada C. Bottone, with the Clerk of the County
f Westchester pursuant to an order of this court bearing
ate July 28, 1954, and granting judgment establishing
aid lien as a good and valid mechanic's lien; and there-
fter the plaintiff in Action No. 2 above entitled, having
oved this court for an Order granting summary judgment
ursuant to Rule 113 of the Rules of Civil Practice in favor
ol. 9] of the plaintiff in Action No. 2 establishing and
djudicating that the lien of the plaintiff in Action No. 2
a good and valid lien in the sum of Eight Hundred
inety-six and 25/100ths ($896.25) Dollars against the
eal property described in the complaint and establishing
iat the liens filed by both of the plaintiffs in the above
titled Actions, be declared to be superior and prior to
e tax liens and claims of the United States of America
asserted in the Answer of the said defendant, United
tates of America, and adjudging that the aforesaid liens
said defendant are subject and subordinate to the liens
both plaintiffs in the above named Actions, and that the
dgment to be entered herein direct the County Clerk
Westchester County to pay out, distribute and turn over
e sum of Twenty-two Hundred ($2200.00) Dollars de-
sited by Ada C. Bottone with said County Clerk pur-
iant to the aforesaid order of this court, and that said

plaintiffs share pro-rata without priority to either of the plaintiffs in Actions Nos. 1 and 2; and thereafter the defendant, the United States of America, have made a cross-motion for an order granting a summary judgment to the defendant the United States of America, pursuant to Rule 113 of the Rules of Civil Practice, upon the ground that there is no genuine issue as to any material fact and that the said defendant is entitled to judgment as a matter of law;

And said several motions having duly and regularly come on to be heard before this Court, Hon. Arthur D. [fol. 10] Brennan, one of the Justices of this Court, presided, at Special Term, Part I thereof, on the 16th day of February 1955;

Now, upon reading and filing the Notice of Motion in behalf of the plaintiffs in Action No. 1, dated January 21, 1955, together with the affidavit of Robert Aquilino, sworn to the 21st day of January, 1955, and the pleadings in both of the above entitled Actions thereto annexed, and upon the Order of this Court dated July 28, 1954, heretofore entered in both of said Actions, substituting the United States of America as a party defendant in the place and stead of the original defendant in both of said Actions, Ada C. Bottone, and upon the stipulation annexed to said motion papers dated respectively, May 5, 1954 and August 11, 1953, all of which were read in support of the motion of the plaintiffs in Action No. 1;

And on reading and filing the Notice of Motion of the plaintiff in Action No. 2 dated January 27, 1955, together with the affidavit of Michael R. Iorio, sworn to the 27th day of January, 1955, thereto annexed, read in support of the motion of the plaintiff in Action No. 2;

And upon reading and filing the Notice of Motion of the defendant the United States of America, dated February 11, 1955, together with the affidavit of J. Donald McNamara, sworn to the 11th day of February, 1955, with the exhibits thereto annexed, consisting of a Certificate of Assessments [fol. 11] and Payments, Treasury Department Form #899 and Notice of Federal Tax Liens Under Internal Revenue

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Law, Treasury Department Form #668, all read in opposition of the motions of both plaintiffs in the above entitled Action, and in support of the motion of the defendant the United States of America for summary judgment as aforesaid;

And after hearing Harold M. Edwards of counsel for the plaintiffs in Action No. 1, in support of the motion made in behalf of said plaintiffs, Isidore Zamore, of counsel for the plaintiff in Action No. 2 in support of the motion made by said plaintiff, and J. Donald McNamara, Assistant United States Attorney for the Southern District of New York, of counsel for the defendant United States of America, in opposition to the motions made by both the plaintiffs in the above entitled Actions and in support of the cross-motion made by the defendant, the United States of America herein; and upon filing the opinion of the Court it is hereby

Ordered, that the motion of the plaintiffs in Action No. 1 above entitled, for summary judgment under Rule 113 of the Rules of Civil Practice be, and the same hereby is, granted to the extent hereinafter set forth, and it is further

Ordered, that the motion of the plaintiff in Action No. 2 above entitled, for summary judgment under Rule 113 of the Rules of Civil Practice, be, and the same hereby is granted to the extent hereinafter set forth, and it is further

[fol. 12] Ordered, that the cross-motion of the defendant, the United States of America, be, and the same hereby is, in all respects, denied, and it is further

Ordered, adjudged and decreed that the Answer of the defendant, the United States of America, interposed in both the entitled actions, shall be, and the same hereby are stricken out and dismissed, and it is further

Ordered, adjudged and decreed that the plaintiffs in Action No. 1, have a valid lien for the sum of $1400.00 against the fund hereinafter set forth, and that the plaintiff Action No. 2 has a valid lien against said fund for the sum of $896.25, and it is further

Ordered, adjudged and decreed that each of the plaintiffs in the above entitled Actions, shall be and they hereby are declared to be entitled to their proportionate shares of the fund now on deposit with the Clerk of the County of Westchester, together with any accrued interest thereon remaining in the hands of said Clerk, and it is further

Ordered, adjudged and decreed that the County Clerk of Westchester County, or such other fiscal representative of the County of Westchester having possession of funds heretofore deposited by the former defendant herein, Ada C. Bottone, to the credit of the two above entitled Actions, amounting at the time of such deposit to the sum of [fol. 13] $2,200.00, shall be and he hereby is directed, upon presentation to him of a certified copy of this Order and Judgment, to pay over the aforesaid fund to the plaintiffs in the above entitled Actions in the following proportions:

To: Plaintiffs Robert Aquilino and Joseph Spero, co-partners doing business under the firm name and style of Home Maintenance Co.: Such fraction thereof as the sum of $1400.00 bears to $2,296.25.

To: Plaintiff Colonial Sand and Stone Co., Inc.: Such fraction thereof as the sum of $896.25 bears to $2,296.25.

Enter

/s/ Arthur D. Brennan, Justice of the Supreme Court.

Edward L. Warren, Clerk.

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IN THE SUPREME COURT OF NEW YORK

NOTICE OF MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS IN ACTION No. 1—January 21, 1955

Sirs:

Please Take Notice that upon the pleadings in the two above entitled actions, copies of which are hereto annexed, and more particularly upon the answer of the defendant, United States of America, and the separate defense and [fol. 14] cross-claim therein set forth, and upon the an-

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nexed affidavit of Robert Aquilino, one of the plaintiffs in the above entitled action, duly verified the 21st day of January, 1955, which is hereto annexed, and upon all other papers and proceedings heretofore had, including the annexed notice of appearance in behalf of the defendant, Fleetwood Paving Corp., the order of this Court substituting United States of America in the place and stead of the defendant Ada Bottone, which order bears date the 28th day of July, 1954, and the stipulations dated respectively May 5, 1954 and August 11, 1953, all of which documents are hereto annexed and made part of this application, the undersigned will move this Court at a Special Term, Part I thereof, to be held in and for the County of Westchester at the County Court House in the City of White Plains, N. Y., on the 11th day of February, 1955, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order and judgment in favor of the plaintiffs and against the defendant, United States of America, in Action No. 1 above entitled, striking out the answer of the defendant, United States of America, and the cross-claim set forth in said answer, and for summary judgment in favor of the plaintiffs thereon and against the defendant, United States of America, pursuant to Rule 113 of the Rules of Civil Practice, and

Please Take Further Notice that upon all of the papers heretofore enumerated, the undersigned will at the same [fol. 15] time and place move this Court for a further order, pursuant to Rule 113 of the Rules of Civil Practice, granting to the plaintiff summary judgment in Action No. 1 above entitled, adjudging that the plaintiffs have a valid lien upon the premises described in the complaint in said action for the sum of $1,400.00, and granting to the plaintiffs judgment thereon with interest as therein prayed for, and declaring that the lien of the plaintiffs attach to the monies heretofore deposited by the former defendant, Ada C. Bottone, with the Clerk of the County of Westchester, pursuant to the aforesaid order of this Court bearing date July 28, 1954, together with the costs and disbursements of Action No. 1, upon the ground that there is no defense thereto, and for such other and further relief as to the Court may seem just and proper.

Please Take Further Notice that you are required to serve answering affidavits, if any, upon the undersigned five days before the return day of this motion.

Dated: Mount Vernon, N. Y., January 21, 1955.

Yours, etc.,

Charles S. Friedman, Attorney for the Plaintiffs, By Harold M. Edwards, of Counsel.

To: All Counsel of Record.

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[fol. 16]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

AFFIDAVIT OF ROBERT AQUILINO, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

State of New York,
City of Mount Vernon,
County of Westchester—ss.:

Robert Aquilino, being duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action and makes this affidavit in support of a motion for summary judgment, pursuant to Rule 113 of the Rules of Civil Practice, striking the answer of the defendant United States of America interposed in Action No. 1, above entitled, and granting judgment in favor of the plaintiffs against the defendant United States of America on said answer and in favor of the plaintiffs thereon.

The history and status of the above entitled action is as follows:

On August 25, 1952 plaintiffs entered into a contract in writing with the defendant Fleetwood Paving Corp., wherein and whereby it was agreed that plaintiffs would furnish the labor and material upon certain premises known as Mario's Restaurant at Tuckahoe, New York in rebuilding the front porch, resurfacing the side porch, installing wire lath and cement, installing walls and piers under porch posts, installing steps and flooring for a total contract

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[fol. 17] price of $2,400.00. At the time, Fleetwood Paving Corp. was general contractor on the job, which consisted of remodeling work at said Mario's Restaurant. That thereafter plaintiffs entered upon the performance of their contract and duly completed the same in all respects. That the defendant Fleetwood Paving Corp. paid to the plaintiffs on account of the work done and materials furnished the sum of $1,000.00, but thereafter said defendant failed, neglected and refused to pay to the plaintiffs the balance of said contract price, to wit the sum of $1,400.00, or any part thereof, although payment of said balance of $1,400.00 was duly demanded by the plaintiffs from the defendant Fleetwood Paving Corp.

That Mario's Restaurant, described in said contract, was owned, at the time and at all times thereafter, by one Ada Bottone, who had record title to said premises. That said premises were situate in the Town of Eastchester, Westchester County, New York, and are more particularly described in the complaint in this action, copy of which is annexed to this affidavit and made a part hereof.

That upon the failure of the defendant Fleetwood Paving Corp. to pay to plaintiffs the balance due to plaintiffs under said contract, and on the 3rd day of November, 1952, which was within four months after the final performing of the work and the final furnishing of the materials on said job, plaintiffs filed in the office of the Clerk of the County of Westchester a notice of lien in the form prescribed by the [fol. 18] provisions of the Lien Law of the State of New York, which said notice was in writing and stated the name and residence of the lienors and their business address and principal place of business, the name of the owner of the real property against whose interest therein a lien was claimed and the interest of the owner so far as known to the lienors, the name of the corporation by whom the lienors were employed and to whom they furnished materials, the labor performed and the materials furnished and the agreed price and value thereof, the amount unpaid to the lienors for such labor and materials, the times when the first and last items of work were performed and materials furnished, the property subject to the lien with a description thereof sufficient for identification, together with its location by

street and number. That said notice of lien was duly verified by the plaintiff Robert Aquilino.

That said notice of lien was served upon the said Ada Bottone and Fleetwood Paving Corp. on November 6, 1952 by the service upon them of a copy thereof by registered mail. That said lien has not been paid, waived or discharged.

That thereafter and on the 9th day of June, 1953, an action was instituted by the plaintiffs against Ada Bottone, owner of said Mario's Restaurant, Fleetwood Paving Corp., the general contractor who had employed plaintiffs, and Colonial Sand and Stone Co., Inc., a domestic corporation which had or claimed a lien for materials furnished on the job, and on the 12th day of June, 1953 a notice of the [fol. 19] pendency of said action was duly filed in the office of the Clerk of Westchester County.

That Ada Bottone, the owner of said premises, served an answer by Messrs. Cribari, Scapolito & Solinger, attorneys at law of 100 Stevens Avenue, Mount Vernon, New York, in which said defendant, after denying knowledge or information sufficient to form a belief with respect to the allegations of the complaint, admitted the plaintiffs' lien was filed, and that a copy of said notice of lien was served upon her. She also interposed an affirmative defense in which she alleged that she was indebted to Fleetwood Paving Corp., the general contractor, in the sum of $2,200.00 under her contract with that corporation, but that the United States Government, acting through the Treasury Department, Internal Revenue Service, filed a lien and levied against the monies remaining in the hands of Ada Bottone and unpaid to the defendant Fleetwood Paving Corp. for unpaid withholding taxes due from the defendant Fleetwood Paving Corp. to the Government. She further alleged that she has no claim on the sum of $2,200.00 remaining unpaid and asked the Court to adjudicate and order payment to such person or persons as may be entitled thereto, stating that she is ignorant of the respective rights of the United States Government and the other parties in the action in and to said monies.

Fleetwood Paving Corp. appeared in said action by notice of appearance dated November 25, 1953, but defaulted in

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pleading, and said defendant has ever since and now is in [fol. 20] default in pleading in said action. That a copy of the answer of the defendant Ada Bottone and of the notice of appearance of the defendant Fleetwood Paving Corp. are hereto annexed and made a part of this affidavit.

That on or about the 9th day of July, 1953, the defendant Colonial Sand and Stone Co., Inc. instituted Action No. 2 above, naming as the original defendants therein Ada Bottone, Mario's Miramare Restaurant, Home Maintenance Co. and Fleetwood Paving Corp. That the said Colonial Sand and Stone Co., Inc. were represented in said action by Jacob I. Goodstein, whose post office address is 21 East 40th Street, New York 16, N. Y.

That the defendant Colonial Sand and Stone Co., Inc. in Action No. 1, being also plaintiff in Action No. 2, appeared in Action No. 1 by the said Jacob I. Goodstein, and ultimately and under date of August 11, 1953, Colonial Sand and Stone Co., Inc. and plaintiffs in Action No. 1 entered into a stipulation wherein and whereby it was agreed that the parties need not serve answers in the two above entitled actions, but that the allegations of each should be deemed denied by the other, and further provided that in the event that either party should move to consolidate said two actions, both agreed to join in the stipulation for such consolidation. A copy of said stipulation is hereto annexed and made a part of this affidavit. That thereafter and by stipulation bearing date May 5, 1954, said two parties further stipulated, by stipulation joined in by Messrs. Cribari, Scapolito & Solinger, attorneys for Ada C. [fol. 21] Bottone and Fleetwood Paving Corp., that said two actions be tried together without consolidation, pursuant to Section 96a of the Civil Practice Act. That a copy of said stipulation is hereto annexed and made a part of this affidavit.

That thereafter and by motion made in both actions by and in behalf of the defendant Ada Bottone, and by order dated July 28, 1954 made by this Court, it was ordered that the said Ada Bottone be permitted to deposit with the Clerk of the County of Westchester the sum of $2,200.00 and that the said Ada Bottone be discharged from liability to either

the plaintiffs in the above two actions or to the United States of America, and that the said sum of $2,200.00 be deposited to the credit of both of the two above entitled actions; and it was further ordered that thereupon the said Ada Bottone be substituted as a defendant in both of said actions by United States of America as defendant. That a copy of said order is hereto annexed and made a part of this affidavit. That thereafter defendant United States of America interposed an answer herein, to which this motion is addressed. A copy of said answer is hereto annexed and made a part of this affidavit.

That deponent is advised and verily believes that the defendant United States of America has at no time filed any notice of its lien against the real property of the defendant Ada Bottone in the Recording Office in Westchester County, where said real property is located, as provided for in Section 240 of the Lien Law of the State of New York. [fol. 22] That as appears from the answer of the defendant United States of America, the said defendant filed a notice of Federal tax liens in the aggregate sum of $5,632.81 in the office of the City Clerk of the City of Mount Vernon upon all property and rights to property belonging to the defendant Fleetwood Paving Corp. That said notice of liens was filed on October 21, 1952. That no levy was made thereon, as appears from said answer, until December 5, 1952, at which time it is alleged that said levy was served on Mario's Miramare Restaurant.

That said levy, if valid, was made subsequent to the date when plaintiffs' notice of lien was duly filed in the office of the Clerk of the County of Westchester, and deponent is informed and verily believes that upon the answer of the defendant United States of America it appears that plaintiff, to the extent of the amount of their lien with interest, is superior to that of the United States of America.

That deponent is informed and verily believes that there is no defense to plaintiffs' cause of action on the part of United States of America and that its answer should be stricken on this motion and judgment entered against the United States of America to the extent of the amount of plaintiffs' claim.

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No previous application for the relief herein sought has been made.

Robert Aquilino

(Sworn to by Robert Aquilino on January 21, 1955.)

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[fol. 23]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

COMPLAINT IN ACTION No. 1, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION No. 1

The complaint of the plaintiffs alleges as follows:

I. That plaintiffs are co-partners doing business under the firm name and style of Home Maintenance Co.

II. Upon information and belief, that the defendant Fleetwood Paving Corp. is a corporation organized under the laws of the State of New York.

III. That at all of the times herein mentioned, the defendant Ada Bottone was and still is the owner of certain lands and premises in the Town of Eastchester, County of Westchester, State of New York more particularly bounded and described as follows:

All that parcel of land, together with the buildings erected thereon, in the Town of Eastchester, County of Westchester and State of New York, etc.—

Beginning at a point on the westerly side of New York Post Road, as widened, and now laid out where the same is intersected by the northerly line of land conveyed by Suburbs Holding Company to Richard L. Treffurth by deed recorded in the office of the County [fol. 24] Clerk, Division of Land Records, formerly Register's Office, Westchester County, N. Y. on June 20, 1911 in Liber 1954 of deeds at page 167; thence running along the northerly line of said land so conveyed by deed as aforesaid; North 60° 05′ 21″ West 398.09 feet to a point of curve being the easterly end of a curve forming part of a Southerly line of Lot 65, Block A, on Map of Leewood Knolls filed in said office on August 8,

1924 as Map Number 2651; thence running westerly along said southerly line of Lot 65, Block A, on said map on a curve to the left tangent to the previous course and having a radius of 20 feet a distance of 24.75 feet to the easterly side of a reserve strip one foot wide lying between the premises hereby described and the easterly side of Park Avenue as laid out on said map and a point of reverse curve; thence running along the easterly side of said reserve strip in a southwesterly direction first on a curve to the right having a radius of 518.42 feet a distance of 43.83 feet and on a curve to the left having a radius of 178.96 feet to a point of tangency; and thence running still along the easterly side of said reserve strip along said tangent South 31° 01′ 15″ West 69.91 feet to the northerly line of land shown on "Map of Westchester Park" filed in said office on November 14, 1906 as Map Number 1672; [fol. 25] thence running along same, North 59° 29′ 27″ East 286.96 feet to the northeast corner of same; thence running along land of Marie C. Treffurth, South 54° 14′ 50″ East 186.84 feet to the westerly side of New York Post Road as widened and now laid out; thence running along said westerly side of New York Post Road East 255.45 feet and North 29° 54′ 39″ East 64.21 feet to the point of beginning.

Said premises are known as No. 561 White Plains Road, Tuckahoe, New York.

IV. Upon information and belief, that heretofore and on a date unknown to plaintiffs, defendant Ada Bottone entered into a contract with the defendant Fleetwood Paving Corp., wherein and whereby the defendant Fleetwood Paving Corp. agreed to funish (sic) all the labor and material necessary for certain remodeling and construction work upon the premises of the defendant Ada Bottone, herein described, and that the defendant Ada Bottone promised and agreed to pay to the defendant Fleetwood Paving Corp. a sum of money, the amount of which is unknown to plaintiffs.

V. Upon information and belief, that the defendant, Fleetwood Paving Corp., entered upon the performance of

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said contract and that at the time of the filing of the notice of lien by the plaintiffs, as herein set forth, had duly performed all of the conditions of said contract upon its part [fol. 26] and had so far completed the same as to become entitled to a payment on account of said contract, and at the time of the filing of said notice of lien there was due and owing to said defendant, Fleetwood Paving Corp., under said contract for work and material furnished a sum in excess of amount of plaintiffs' lien herein.

VI. That heretofore and on or about the 25th day of August, 1952 the plaintiffs entered into a contract with the defendant, Fleetwood Paving Corp., a copy of which is attached hereto, marked Exhibit A and made a part hereof.

VII. That the plaintiffs have duly performed all of the conditions of such contract on their part, but that the defendant, Fleetwood Paving Corp., has paid no part of said sum to the plaintiffs except the sum of $1,000.00 paid on account thereof, leaving a balance of $1,400.00 due and owing to the plaintiffs, no part of which has been paid.

VIII. That the work, labor and services so performed and the materials so furnished by plaintiffs were performed and furnished for the improvement of the real property hereinbefore described and were performed with the knowledge and consent of the defendant, Ada Bottone.

IX. That on the 3rd day of November, 1952 and within four months after the final performing of the work and the final furnishing of the material aforesaid dating from the [fol. 27] last item of work performed and materials furnished, plaintiffs caused to be filed in the office of the Clerk of the County of Westchester, that being the County where the property hereinbefore described is situated, a notice of lien in writing, which notice stated the name and residence of the lienors and their business address and principal place of business; the name of the owner of the real property against whose interest therein a lien is claimed and the interest of the owner so far as is known to the lienors; the name of the corporation by whom the lienor was employed and to whom they furnished the materials; the labor performed and materials furnished and the agreed price and value thereof; the amount unpaid to the lienors

for such labor and materials; the times when the first and last items of work were performed and materials furnished; the property subject to the lien with a description thereof sufficient for identification, together with its location by street and number, which said notice of lien was duly verified by the plaintiff, Robert Aquilino.

X. That thereafter and on or about the 6th day of November, 1952 the plaintiffs caused a copy of said notice of lien to be duly served by registered mail on the defendants.

XI. That said lien has not been paid, waived or discharged, and that no other action or proceeding either at law or in equity has ever been brought to recover the claim of the plaintiffs or any part thereof.

[fol. 28] XII. Upon information and belief, that all of the defendants herein have or claim to have some interest in or lien upon the said premises, which interest or lien, if any, is subsequent and subordinate to plaintiffs' lien, as hereinabove set forth.

XIII. That no persons other than the defendants above mentioned have or claim to have a lien upon said premises to the knowledge of said plaintiffs, nor has any other lien been filed.

Wherefore, the plaintiffs demand judgment that it be adjudged that they have a valid lien on said premises for the sum of $1,400.00; that the equities of the parties to this action and the order of priority of the different liens be adjusted and determined, and that it be adjudged that the plaintiffs have a lien on said premises prior to the interest therein or lien thereon of any of the defendants; that the interest of the defendant, Ada Bottone, in the premises be sold according to law and that from the proceeds of such sale the plaintiffs be paid the amount of their said lien and interest thereon, together with the expenses of such sale and the costs of this action; that the plaintiffs have judgment for any deficiency that may remain after such payment against the defendant Fleetwood Paving Corp.; that the defendants and all persons claiming under or through them be forever foreclosed of all right or equity of redemption or other interest of said premises, and that

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plaintiffs have such other and further relief as to the Court [fol. 29] may seem just and proper with the costs of this action.

Charles S. Friedman, Attorney for Plaintiffs, Office & P. O. Address, 10 Fiske Place, Mount Vernon, N. Y.

(Unverified.)

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EXHIBIT A, ANNEXED TO COMPLAINT IN ACTION No. 1

lOunt Vernon 7-8130

HOME MAINTENANCE Co.
22 West Sandford Boulevard
Mount Vernon, N. Y.

leetwood Paving Co.
8 Columbus Avenue
t. Vernon, N. Y.

August 25, 1952

Re: Mario's Restaurant
Tuckahoe, N. Y.

e agree to furnish labor and material at subject building, per verbal description by owner, for the sum of $2,400.00. ork to consist as follows:

build front porch (approximately 12 x 60).

l. 30] Reservice side porch (approximately 12 x 30), k on wire lath and necessary thickness of cement to ch new floor. Walls to consist of 12" blocks, the piers er porch posts to consist of 12" blocks. Steps to be le up of 12" blocks with cement threads. Floor to consist " concrete (Mixed gravel 1-2-4).

ments to be made as follows:

pon excavation and foots poured
pon completion of walls
nce upon completion

---

alteration or deviation from above involving extra of labor and materials will be executed only upon

written orders for same, and will become an extra charge over the sum mentioned in this contract.

Signed Robert Aquilino Date 8/28/52

Acceptance of Contract

The foregoing terms and conditions are satisfactory and the same are hereby accepted and agreed upon, and you are hereby authorized to execute the same.

Signed H. Cribari Pres. Date 8/28/52

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[fol. 31]

In the Supreme Court of New York
County of Westchester

Answer of Defendant Ada Bottone in Action No. 1, Read in Support of Motion of Plaintiffs in Action No. 1

Defendant Ada Bottone answering the complaint herein, by her attorneys Cribari, Scapolito & Solinger, alleges as follows:

1. Denies each and every allegation of the complaint contained in the paragraphs thereof numbered "VIII" and "XIII".

2. Denies knowledge or information sufficient to form a belief with reference to the allegations of the complaint contained in the paragraphs thereof numbered "VI", "VII" and "XII".

3. Denies each and every allegation of the complaint in paragraph thereof numbered "IX" except that a certain paper writing purporting to be a valid lien was filed.

4. Denies each and every allegation of the complaint contained in paragraph "X" thereof, except that a certain paper writing purporting to be a copy of said notice of lien was served.

For an Affirmative Defense Herein

5. That there has been at all times since the completion of the contract between defendant Ada Bottone and defen

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[fol. 32] dant Fleetwood Paving Corp. due to Fleetwood Paving Corp. the sum of $2200.00 under and pursuant to the terms of the said contract and the said sum now is due and owing to Fleetwood Paving Corp.

6. That on or about the 31st day of October, 1952 and prior to the commencement of this action and prior to the filing of the lien sued on herein, the United States Government acting through the Treasury Department, Internal Revenue Service, filed a lien and levied against the monies remaining in the hands of defendant, Ada Bottone, and unpaid to defendant Fleetwood Paving Corp. for unpaid withholding taxes due the Government from defendant Fleetwood Paving Corp.

7. That defendant Ada Bottone has no claim upon the sum of $2200.00 remaining unpaid and due to defendant Fleetwood Paving Corp. under the contract heretofore referred to and is willing to pay said sum to such person, persons or agencies as the Court may adjudicate is entitled to payment.

8. Defendant Ada Bottone is ignorant of the respective rights of the plaintiff, the United States Government and the other defendants herein, and cannot determine without hazard to herself to whom to make payment.

Wherefore, defendant Ada Bottone demands judgment dismissing the complaint herein, or in the alternative, ad-[fol. 33] judicating to whom the said monies remaining unpaid on the contract should be paid and upon payment of the same, the mechanic's lien filed by plaintiff herein be discharged of record and defendant Ada Bottone discharged of any further liability and for such other and further relief as the Court may deem just and proper in the premises.

Cribari, Scapolito & Solinger, Attorneys for Defendant Ada Bottone, Office & P. O. Address, 100 Stevens Avenue, Mount Vernon, N. Y.

(Unverified.)

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

COMPLAINT IN ACTION NO. 2, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

Plaintiff, complaining of the defendants by Jacob I. Goodstein, its attorney, respectfully shows and alleges:

(1) That at all the times hereinafter mentioned, plaintiff was and still is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York.

[fol. 34] (2) Upon information and belief, that at all the times hereinafter mentioned, the defendant, Fleetwood Paving Corp., was and still is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York.

(3) That at all the times hereinafter mentioned, the defendant Ada C. Bottone was and still is doing business under the firm name and style of Mario's Miramare Restaurant.

(4) Upon information and belief, that at all the times hereinafter mentioned, Robert Aquilino and Joseph Spero were and still are co-partners doing business under the firm name and style of Home Maintenance Co.

(5) That at all the times hereinafter mentioned, the defendant Ada C. Bottone was and still is the owner in fee of the following described property:

All that parcel of land, together with the buildings erected thereon, in the Town of Eastchester, County of Westchester and State of New York, bounded and described as follows:

Beginning at a point on the westerly side of New York Post Road, as widened, and now laid out where the same is intersected by the northerly line of land conveyed by Suburbs Holding Company to Richard L. Treffurth by deed recorded in the Office of the County [fol. 35] Clerk, Division of Land Records, formerly

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Register's Office, Westchester County, N. Y., on June 20, 1911 in Liber 1954 of Deeds at page 167; thence running along the northerly line of said land so conveyed by deed as aforesaid; north 60 degrees 05′ 21″ West 398.09 feet to a point of curve being the easterly end of a curve forming part of the southerly line of Lot 65, Block A, on "Map of Leewood Knolls" filed in said office on August 8, 1924 as Map Number 2651; thence running westerly along said southerly line of Lot 65, Block A, on said map on a curve to the left tangent to the previous course and having a radius of 20 feet a distance of 24.75 feet to the easterly side of a reserve strip one foot wide lying between the premises hereby described and the easterly side of Park Avenue as laid out on said map and a point of reverse curve; thence running along the easterly side of said reserve strip in a southwesterly direction first on a curve to the right having a radius of 518.42 feet a distance of 43.83 feet and on a curve to the left having a radius of 178.96 feet to a point of tangency and; thence running still along the easterly side of said reserve strip along said tangent South 31 degrees 01′ 15″ West 69.91 feet to the northerly line of land shown on "Map of Westchester Park" filed in said office on November 14, 1906 [fol. 36] as Map Number 1672; thence running along same, North 59 degrees 29′ 27″ East 286.96 feet to the northeast corner of same; thence running along land of Marie C. Treffurth, South 54 degrees, 14′ 50″ East 186.84 feet to the westerly side of New York Post Road as widened and now laid out; thence running along said westerly side of New York Post Road North 29 degrees, 56′ 49″ East 255.45 feet and North 29 degrees 54′ 39″ East 64.21 feet to the point of beginning.

Said premises are known as No. 561 White Plains Road, Tuckahoe, New York.

(6) Upon information and belief, that at all the times hereinafter mentioned, the defendant Ada C. Bottone owned and operated a restaurant in the aforesaid premises known as Mario's Miramare Restaurant.

(7) Upon information and belief, that heretofore and prior to the commencement of this action, the defendant, Fleetwood Paving Corp. (hereinafter referred to as "Contractor") and the defendant, Ada C. Bottone, individually and/or Ada C. Bottone doing business under the firm name and style of Mario's Miramare Restaurant (hereinafter referred to as "Owner") entered into a contract pursuant to the terms of which the Contractor agreed to perform certain labor and furnished certain materials for the construction and improvement of the land and building owned and operated by the Owner for which the Owner agreed to pay [fol. 37] certain sums of money to the said Contractor, the exact amount of which is unknown to this plaintiff.

(8) Upon information and belief, that thereafter the Contractor entered upon the performance of the work on its part to be performed and duly furnished certain materials and performed certain labor which it was required to furnish and perform under the terms and conditions of the contract between it and the Owner and at the time of the filing of this plaintiff's lien, the Contractor had duly performed all the terms and conditions of the said contract on its part to be performed.

(9) Upon information and belief, that during the performance of the said work by the Contractor, the said Contractor performed certain extra work and labor, furnished certain extra material and furnished certain extra equipment which it was required to furnish and perform by the Owner and for which the Owner agreed to pay to the Contractor certain amounts of money, the exact amount of which is unknown to this plaintiff.

(10) Upon information and belief, that a large and substantial sum of money became due and owing to the Contractor from the Owner under and pursuant to the terms of the contract between the said Owner and Contractor and in addition thereto certain sums of money for extra work and labor performed and materials furnished by the said [fol. 38] Contractor to the Owner, the exact amount of which is unknown to this plaintiff, and, upon information and belief, that at the time of the filing of this plaintiff's

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lien, there was a large and substantial sum of money due and owing from the Owner to the Contractor, the exact amount of which is unknown to this plaintiff, and, upon information and belief, the said amount exceeds the amount of this plaintiff's lien as hereinafter set forth.

(11) Upon information and belief, that at the time of the filing of this plaintiff's lien, there was due and owing and there has subsequently become due and owing from the Contractor to the Owner, a large sum of money far in excess of the amount of this plaintiff's lien.

(12) That the said Contractor duly performed all the terms and conditions of the said contract on its part to be performed.

(13) That heretofore and prior to the commencement of this action and between October 2, 1952 and October 8, 1952, both dates inclusive, this plaintiff at the special instance and request of the defendant Contractor, sold and delivered to the said Contractor, materials consisting of stone, ¼ inch Trap Rock and white sand of the agreed price and reasonable value of $896.25, no part of which has been paid although duly demanded.

[fol. 39] (14) That said materials were furnished and delivered by this plaintiff to the Contractor for use in and which became part of the improvement erected and constructed on the premises hereinabove described and which materials were used by the Contractor for the construction of said improvement with the knowledge and consent of the Owner.

(15) That thereafter and on November 10, 1952 and within four months after the furnishing of the last item of material by this plaintiff, this plaintiff duly filed with the County Clerk of Westchester County, a duly verified notice of lien against the premises hereinabove set forth, which notice of lien contained the name and address of this plaintiff, the name of the owner or lessee of the real property hereinabove described against whose interest the lien is claimed, the name of the person to whom the lienor furnished its materials, the materials furnished, the amount unpaid, the time when the first item of material was deliv-

ered, the time when the last item of material was delivered, the property subject to the lien with a description sufficient for identification, which lien duly complied in all respects with the Lien Law of the State of New York for the filing of liens against private improvements, and which lien was duly entered and docketed by the said County Clerk of Westchester County on the 10th day of November, 1952 in the lien docket kept and maintained by him for that purpose.

[fol. 40] (16) That no other action or proceeding at law or in equity has been instituted or is pending for the foreclosure of this plaintiff's lien and that the lien and claim of this plaintiff remains open and undischarged of record, and that the said lien and claim has not been paid, waived, cancelled or discharged.

(17) Upon information and belief, that the defendants Home Maintenance Co. and Fleetwood Paving Corp., have or claim to have some interest in or lien upon the premises hereinabove described, which interests or lien, if any, are subject and subordinate to the lien and claim of this plaintiff.

(18) Upon information and belief, no other persons have or claim to have any subsequent liens or claims against the aforesaid real property by way of mortgage, judgment or otherwise and no persons appear from the records in the office of the County Clerk of Westchester County to have any interest in the said premises other than as herein stated.

(19) That this plaintiff has no adequate remedy at law.

Wherefore, plaintiff demands judgment as follows:

(a) That the Court adjudge and determine the equities, rights and interest of all the parties to this action and determine all the issues raised by the pleadings in this action;

[fol. 41] (b) That the plaintiff be adjudged to have acquired by the filing and docketing of its lien a good, valid and subsisting lien against the said real property for the

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sum of $896.25 with interest thereon from October 25, 1952, together with the costs and disbursements of this action;

(c) That the plaintiff have judgment enforcing the said lien against the said real property, and that it be decreed that the real property herein be sold in accordance with the provisions of law and the rules and practice of this Court and that from the proceeds of said sale there be paid the expenses incident thereto and the costs and disbursements of this action and the lien and claim of this plaintiff with interest from October 25, 1952;

(d) That if the plaintiff for any reason is unable to establish a good, valid and subsisting lien against the real property hereinabove described that it have judgment against the defendants, Fleetwood Paving Corp., Ada C. Bottone and Ada C. Bottone doing business under the firm name and style of Mario's Miramare Restaurant, for the sum of $896.25 with interest thereon from October 25, 1952 besides the costs and disbursements of this action;

(e) That the plaintiff have personal judgment against the defendants, Fleetwood Paving Corp., Ada C. Bottone, Ada C. Bottone doing business under the firm name and style of Mario's Miramare Restaurant, for the amount of its lien and claim with interest, costs and disbursements or [fol. 42] for the amount of any deficiency which may remain unpaid to this plaintiff in the event that the proceeds of said sale are insufficient to pay the lien and claim of this plaintiff with interest, costs and disbursements;

(f) That the defendants and each of them and all persons claiming through or under them or any of them, be forever barred and foreclosed from and of any and all lien, claim, right, title, interest and equity of redemption in and to said property;

(g) That the plaintiff have such other and further relief as to the Court may seem just and proper in the premises.

Jacob I. Goodstein, Attorney for Plaintiff, Office & P. O. Address, 21 East 40th Street, Borough of Manhattan, City of New York.

(Verified by Michael R. Iorio, as Assistant Secretary, on June 3, 1953.)

[fol. 43]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

ANSWER OF DEFENDANT ADA C. BOTTONE IN ACTION NO. 2 READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

Defendant, Ada C. Bottone, answering the complaint herein by her attorneys, Cribari, Scapolito & Solinger, alleges as follows:

1. Denies each and every allegation of the complaint contained in the paragraphs thereof numbered (9), (18) and (19).

2. Denies each and every allegation of the complaint in the paragraphs thereof numbered (10) and (11) except that there has been at all times since the completion of said work, and there now is due and owing to the contractor by the owner the total sum of $220.00 under and pursuant to the terms of the contract between the owner and the said contractor.

3. Denies knowledge or information sufficient to form a belief with respect to the allegations of the complaint contained in paragraphs thereof numbered (13), (14) and (17).

4. Denies each and every allegation of the complaint contained in paragraphs thereof numbered (15), except that there has been filed a certain paper writing purporting to be a valid lien.

[fol. 44]

For a First Separate and Distinct Defense

5. That heretofore and on or about the 21st day of November, 1952, plaintiff commenced an action against defendant Fleetwood Paving Corp., at law, in the Supreme Court of the State of New York, New York County, to recover the total sum of $2,042.93 which said sum upon information and belief, included the amount of the lien, subject of the within action, and which said law suit in part, upon information and belief, is based upon and arose out of the

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same transaction involved herein and that said action is still pending and undetermined.

As and for a Second Separate and Distinct Defense

6. That on or about the 31st day of October, 1952 and prior to the commencement of this action and prior to the filing of the lien sued on herein, the United States Government acting through the Treasury Department, Internal Revenue Service, filed a lien and levied against the monies remaining in the hands of defendant, Ada C. Bottone, and unpaid to defendant Fleetwood Paving Corp. for unpaid withholding taxes due the Government from defendant Fleetwood Paving Corp.

7. That defendant Ada C. Bottone has no claim upon the sum of $2200.00 remaining unpaid and due to defendant [fol. 45] Fleetwood Paving Corp. under the contract heretofore referred to and is willing to pay said sum to such person, persons or agencies as the Court may adjudicate is entitled to payment.

8. Defendant Ada C. Bottone is ignorant of the respective rights of the plaintiff, the United States Government and the other defendants herein, and cannot determine without hazard to herself to whom to make payment.

Wherefore, defendant, Ada C. Bottone, demands judgment dismissing the complaint herein, or in the alternative, adjudicating to whom the said monies remaining unpaid on the contract should be paid and upon payment of the same the mechanic's lien filed by plaintiff herein be discharged of the record and defendant Ada C. Bottone discharged of any further liability and for such other and further relief as the Court may deem just and proper in the premises.

Cribari, Scapolito & Solinger, Attorneys for Defendant Ada C. Bottone.

(Verified July 14, 1953.)

[fol. 46]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

STIPULATION AS TO ANSWERS IN ACTIONS NO. 1 AND NO. 2, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1 —August 11, 1953

Whereas, the plaintiff in Action No. 1 instituted said action to foreclose a mechanic's lien filed by it against certain real property owned by the defendant Ada C. Bottone, located in Westchester County; and

Whereas, plaintiffs in Action No. 2 instituted said action to foreclose a mechanic's lien filed by them against certain real property owned by the defendant, Ada Bottone, located in Westchester County; and

Whereas, both lien foreclosure actions affect the same parties and the same real property;

Now, Therefore, it is agreed by and between the undersigned as follows:

1. That the Home Maintenance Co., defendant in Action No. 1 shall serve a notice of appearance upon the attorney for the plaintiff in said Action No. 1, but need not serve an answer in said action and that the allegations contained in the plaintiff's complaint in Action No. 1 shall be deemed denied by the said defendant, Home Maintenance Co.

2. That Colonial Sand & Stone Co., Inc., defendant in Action No. 2, shall serve a notice of appearance upon the [fol. 47] attorney for the plaintiffs in said Action No. 2, but need not serve an answer in said action and that the allegations contained in the plaintiffs' complaint in Action No. 2 shall be deemed denied by the said defendant, Colonial Sand & Stone Co., Inc.

3. That in the event either of the plaintiffs in said actions move to consolidate the said actions the other plaintiff agrees to join in said application and file an affidavit with the Court stating that he joins in the application for a con-

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solidation of said actions and consents to such consolidation.

Dated: New York, N. Y., August 11, 1953.

Jacob I. Goodstein, Attorney for Plaintiff in Action No. 1.

Charles S. Friedman, By Harold M. Edwards, Attorney for Plaintiffs in Action No. 2.

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[fol. 48]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

STIPULATION AS TO CONSOLIDATION, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1—May 5, 1954

It is hereby stipulated and agreed by and between the undersigned that the above entitled actions be tried and heard together, without consolidation pursuant to provisions of Section 96-a of the Civil Practice Act and that an order to that effect may be entered herein by any one of the parties without further notice to any of the other parties herein.

Dated: New York, May 5, 1954.

Jacob I. Goodstein, Attorney for plaintiff in Action No. 1 and defendant in Action No. 2.

Charles S. Friedman, By Harold M. Edwards, Attorney for plaintiff in Action No. 2 and defendant in Action No. 1.

Cribari, Scapolito & Solinger, Attorneys for Ada C. Bottone and Fleetwood Paving Corp., defendants in Actions No. 1 and 2.

[fol. 49]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

ORDER OF SUBSTITUTION, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1—July 28, 1954

Present—Hon. Arthur D. Brennan, Justice.

A motion by defendant Ada C. Bottone having been made in both of the above entitled actions, for an order pursuant to Section 287 of the Civil Practice Act, interpleading and substituting the United States of America as defendant in both the above entitled actions, in the place and stead of defendant Ada C. Bottone, and said motion having duly come on for hearing before me,

Now, upon reading and filing the affidavits of Ada C. Bottone, both dated and sworn to June 10, 1954, and the summons and complaint in this action, all in support of the motions, and the affidavit of Harold M. Edwards, sworn to the 28th day of June 1954, consenting to the granting of the said motion in Action #1, and the affidavit of Isidore Zamore, sworn to the 23rd day of June 1954, consenting to the granting of the motion in Action #2, and the United States of America having failed to appear or oppose the [fol. 50] said motions, and the said motions having been submitted to the Court for determination:

Now, on motion of Cribari, Scapolito & Solinger, attorneys for the defendant Ada C. Bottone, in both the above entitled actions, it is,

Ordered, that on payment by defendant Ada C. Bottone to the Clerk of the County of Westchester, of the sum of Two Thousand Two Hundred ($2,200.00) Dollars, within fifteen (15) days from the entry of this order, the United States of America be substituted as defendant in both of the above actions in the place of the defendant Ada C. Bottone, and that said Ada C. Bottone be discharged from liability either to the plaintiffs above named or to the United States of America, and it is further,

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Ordered, that the said sum of Two Thousand Two Hundred ($2,200.00) Dollars be deposited with the Clerk of the County of Westchester to the credit of both of the above entitled actions, and it is further,

Ordered, that the defendant Ada C. Bottone serve upon the United States Attorney for the Southern District of New York, by registered mail, a copy of the order to be entered hereon, with notice of entry thereof, together with a copy of the summons and complaint in each action.

Enter, Arthur D. Brennan, J. S. C.

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[fol. 51]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

ANSWER OF DEFENDANT UNITED STATES OF AMERICA IN ACTION NO. 1, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

The defendant, United States of America, by its attorney, J. Edward Lumbard, United States Attorney for the Southern District of New York, for its answer to the complaint herein:

I. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI.

II. Denies each and every allegation contained in paragraphs XII and XIII.

As and for a First Separate and Distinct Defense and Cross-Claim, the Defendant, United States of America, Alleges:

III. It is a corporate sovereign body politic.

IV. This defense and cross-claim arises under the Internal Revenue Laws of the United States.

V. Upon information and belief, during December, 1951 the Commissioner of Internal Revenue of the United States

Treasury Department made an assessment of withholding and Social Security taxes in the amount of $4,420.67, plus interest in the amount of $44.03, on the wages paid by [fol. 52] defendant, Fleetwood Paving Corp., of 720 South Columbus Avenue, Mount Vernon, New York, to its employees during the third quarter of the year 1951. $4,109.40 of this assessment has been paid, leaving an unpaid balance of $355.30.

VI. Upon information and belief the assessment list for the assessments alleged in paragraph V was received by Collector of Internal Revenue, District of Albany, New York, on December 27, 1951.

VII. Upon information and belief during March 1952 the Commissioner of Internal Revenue of the United States Treasury Department made an assessment of withholding and Social Security taxes in the amount of $3,136.87, plus interest in the amount of $31.24, on the wages paid by defendant, Fleetwood Paving Corp., to its employees during the 4th quarter of the year 1951. No part of this assessment has been paid.

VIII. Upon information and belief the assessment list for the assessments alleged in paragraph VII was received by the Collector of Internal Revenue, District of Albany, New York, on March 21, 1952.

IX. Upon information and belief on October 21, 1952 the Collector filed a written notice of Federal Tax Lien(s) under Internal Revenue Laws in the amount of $5,632.81 [fol. 53] in the office of the City Clerk of the City of Mount Vernon wherein liens were claimed on behalf of the United States upon all property and rights to property belonging to the defendant, Fleetwood Paving Corp. These liens covered each of the assessments alleged in paragraphs V and VII plus unassessed interest and penalties.

X. Upon information and belief on December 5, 1952 the Collector served a levy in the amount of $6,344.22, representing tax due in the amount of $5,632.81, penalty in the amount of $381.65 and interest in the amount of $329.76, on the defendant, Mario's Miramare Restaurant,

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herein it was notified that all property and rights to roperty belonging to the defendant, Fleetwood Paving orp., and all sums of money owing from Mario's Mira- are Restaurant to Fleetwood Paving Corp. were seized id levied upon. This levy covered the assessments al- ged in paragraphs V and VII.

XI. Upon information and belief the defendant Ada C. ottone, doing business as Mario's Miramare Restaurant, is deposited with the Clerk of the County of Westchester, e sum of $2,200.00 pursuant to an order of this Court tered July 28, 1954 by the Honorable Arthur D. Brennan.

Wherefore, defendant, United States of America, prays:

1. That the Court adjudge and decree that the defen- ol. 54] dant, Fleetwood Paving Corp., is indebted to the fendant, United States of America, in the sum of ,523.41.

2. That the claim of the defendant, United States of nerica, be declared prior to and superior to the claims plaintiff and/or of any of the other defendants herein.

3. That the Court direct the Clerk of the County of estchester to pay to the defendant, United States of nerica, the sum of $2,200.00 now in his hands.

4. That the defendant, United States of America, have h other and further relief as the Court may deem per.

Dated: New York, N. Y., September 28, 1954.

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendants.

By J. Donald McNamara, Assistant United States Attorney.

Unverified.)

[fol. 55]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

ANSWER OF DEFENDANT UNITED STATES OF AMERICA IN ACTION NO. 2, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

The defendant, United States of America, by its attorney, J. Edward Lumbard, United States Attorney for the Southern District of New York, for its answer to the complaint herein:

I. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs (1), (2), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18) and (19).

II. Denies each and every allegation contained in paragraph (18).

As and for a First Separate and Distinct Defense and Cross-Claim, the Defendant, United States of America, Alleges:

III. It is a corporate sovereign body politic.

IV. This defense and cross-claim arises under the Internal Revenue Laws of the United States.

V. Upon information and belief, during December, 1951 the Commissioner of Internal Revenue of the United States Treasury Department made an assessment of withholding and social security taxes in the amount of $4,420.67, plus interest in the amount of $44.03, on the wages paid by [fol. 56] defendant, Fleetwood Paving Corp., of 720 South Columbus Avenue, Mount Vernon, New York, to its employees during the third quarter of the year 1951. $4,109.40 of this assessment has been paid, leaving an unpaid balance of $355.30.

VI. Upon information and belief the assessment list for the assessments alleged in paragraph V was received by Collector of Internal Revenue, District of Albany, New York, on December 27, 1951.

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VII. Upon information and belief during March 1952 the Commissioner of Internal Revenue of the United States Treasury Department made an assessment of withholding and Social Security taxes in the amount of $3,136.87, plus interest in the amount of $31.24, on the wages paid by defendant, Fleetwood Paving Corp., to its employees during the 4th quarter of the year 1951. No part of this assessment has been paid.

VIII. Upon information and belief the assessment list for the assessments alleged in paragraph VII was received by the Collector of Internal Revenue, District of Albany, New York, on March 21, 1952.

IV. (sic) Upon information and belief on October 31, 1952 the Collector filed a written notice of Federal Tax Lien(s) under Internal Revenue Laws in the amount of $5,-[fol. 57] 632.81 in the office of the City Clerk of the City of Mount Vernon wherein liens were claimed on behalf of the United States upon all property and rights to property belonging to the defendant, Fleetwood Paving Corp. These liens covered each of the assessments alleged in paragraphs V and VII plus unassessed interest and penalties.

X. Upon information and belief on December 5, 1952 the Collector served a levy in the amount of $6,344.22, representing tax due in the amount of $5,632.81, penalty in the amount of $381.65 and interest in the amount of $329.76, on the defendant, Mario's Miramare Restaurant, wherein it was notified that all property and rights to property belonging to the defendant, Fleetwood Paving Corp., and all sums of money owing from Mario's Miramare Restaurant to Fleetwood Paving Corp. were seized and levied upon. This levy covered the assessments alleged in paragraphs V and VII.

XI. Upon information and belief the defendant, Ada C. Bottone, doing business as Mario's Miramare Restaurant, has deposited with the Clerk of the County of Westchester, the sum of $2,200.00, pursuant to an order of this Court entered July 28, 1954 by the Honorable Arthur D. Brennan.

Wherefore, defendant, United States of America, prays:

1. That the Court adjudge and decree that the defen-
[fol. 58] dant, Fleetwood Paving Corp., is indebted to the defendant, United States of America, in the sum of $3,523.41.

2. That the claim of the defendant, United States of America, be declared prior to and superior to the claims of plaintiff and/or of any of the other defendants herein.

3. That the Court direct the Clerk of the County of Westchester to pay to the defendant, United States of America, the sum of $2,200.00 now in his hands.

4. That the defendant, United States of America, have such other and further relief as the Court may deem proper.

Dated: New York, N. Y., September 28, 1954.

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant, U. S. of A.

By J. Donald McNamara, Assistant United States Attorney.

(Unverified.)

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[fol. 59]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

NOTICE OF CROSS-MOTION OF PLAINTIFF IN ACTION NO. 2

Sirs:

Please Take Notice that upon the annexed affidavit of Michael R. Iorio, duly sworn to the 27th day of January, 1955, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move by way of cross-motion at Special Term, Part I of the Supreme Court, Westchester County, at the Court House, in the City of White Plains, on the 11th day of February, 1955, at 10:00 A. M., or as soon thereafter as counsel can be heard for an order granting Colonial Sand & Stone Co., Inc., the following relief, to wit:

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1. Granting Summary Judgment pursuant to Rule 113 of the Rules of Civil Practice, in favor of Colonial Sand & Stone Co., Inc. for the sum of $896.25, with interest thereon from October 25, 1952.

2. Adjudicating that the lien filed by Colonial Sand & Stone Co. Inc. on November 10, 1952 for the sum of $896.25 with the County Clerk of Westchester County against Ada C. Bottone, owner of the real property described and set forth in the complaints in [fol. 60] the above-entitled actions described as actions 1 and 2, is a good, valid and subsisting lien against the said real property for the sum of $896.25, together with interest thereon from October 25, 1952.

3. That the liens filed by the plaintiffs in both of the above-entitled actions be declared to be superior and prior to the tax liens and claims of the United States of America as asserted in the said defendant's answer and that the said claims of the said defendant, United States of America are subject and subordinate to the liens of the aforesaid plaintiffs.

4. That judgments to be entered herein directing the County Clerk of Westchester County to pay out, distribute and turn over the sum of $2,200.00 deposited with him by the defendant, Ada C. Bottone, pursuant to an order of this Court, pro-rata and without priority to the plaintiffs in actions 1 and 2.

5. For such other and further relief as to the Court may seem just and proper in the premises.

Please Take Further Notice, that you are required to erve answering affidavits, if any, upon the undersigned, fol. 61] five (5) days prior to the return date of this notion.

Dated: New York, N. Y., January 27, 1955.

Yours, etc.,

Jacob I. Goodstein, Attorney for Colonial Sand & Stone Co., Inc.

o: All counsel of record.

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

AFFIDAVIT OF MICHAEL R. IORIO, READ IN SUPPORT OF CROSS-MOTION OF PLAINTIFF IN ACTION NO. 2 AND IN OPPOSITION TO MOTION OF PLAINTIFFS IN ACTION NO. 1

City, State and County of New York—ss.:

Michael R. Iorio, being duly sworn, deposes and says:

I am Assistant Secretary of Colonial Sand & Stone Co., Inc.

This affidavit is submitted both in support of the annexed motion by Colonial Sand & Stone Co., Inc. and in opposition to the motion by the plaintiffs in Action No. 1. [fol. 62] The facts relating to the above-entitled actions are as follows:

Between October 2, 1952 and October 8, 1952, both dates inclusive, Colonial Sand & Stone Co., Inc., (hereinafter referred to as "Colonial"), at the special instance and request of Fleetwood Paving Corp., (hereinafter referred to as "Fleetwood"), sold and delivered to Fleetwood materials consisting of stone, trap rock and cinders of the agreed price and reasonable value of $896.25. Said materials were furnished and delivered to Fleetwood for use in and which became part of the construction of the public improvement being constructed by Fleetwood for Ada C. Bottone, owner of the premises, more particularly set forth and described in Paragraph Fifth of Colonial's complaint in Action No. 2.

Upon Feetwood's failure to pay Colonial the aforesaid sum of $896.25, Colonial, on November 10, 1952 and within four (4) months after the furnishing of the last item of material, duly filed with the County Clerk of Westchester County, a duly verified notice of lien against Ada C. Bottone, as owner and Fleetwood, as Contractor, against the premises involved in these actions and said notice of lien duly complied in all respects with the Lien Law of the State of New York, relating to the filing of Mechanic's Liens against private improvements and said notice of lien was duly docketed and entered by the County Clerk of Westchester County on November 10, 1952 in the Lien Docket kept and maintained by him for that purpose.

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[fol. 63] On November 12, 1952 copies of said notice of lien were duly served by Registered Mail on the owner, Ada C. Bottone and the Contractor, Fleetwood.

On June 4, 1953 Colonial, as plaintiff, instituted an action in this Court to foreclose its said Mechanic's Lien and on the same day, to wit, June 4, 1953 it filed a Lis Pendens and the original Summons and Verified Complaint with the County Clerk of Westchester County.

Copies of the summons and complaint were served on Ada C. Bottone and Mario's Miramare Restaurant on July 8, 1953 and on the plaintiffs Aquilino and Spero, doing business as Home Maintenance Co., on July 9, 1953. The defendant, Fleetwood served an appearance and demand which was received by our attorney on May 4, 1954. Said defendant, Fleetwood, defaulted in serving its answer and its time to do so has expired and no extension of time was ever granted to said defendant, by our attorney or by any order of this Court.

The owner, Ada C. Bottone, served an answer which was received by our attorney on July 16, 1953 in which the owner set up as an affirmative defense the assertion by the United States of America of its tax claim and lien.

The owner and Fleetwood both appeared by Cribari, Scapolito & Solinger, Esqs., of 100 Stevens Avenue, Mount Vernon, New York.

The Home Maintenance Co. served an appearance which was received by our attorney on August 17, 1953 and ap-

[fol. 64] peared by their attorney, Charles S. Friedman of 0 Fiske Place, Mount Vernon, New York.

After the institution of Action No. 2, Colonial was served n July 15, 1953 with a copy of a summons and complaint n Action No. 1. Colonial served a notice of appearance nd demand in said Action No. 1 on August 11, 1953 and ppeared by our attorney, Jacob I. Goodstein of 21 East 0th Street, New York 16, N. Y.

On August 11, 1953 the attorney for the plaintiffs in the bove-entitled actions entered into a stipulation dated Au- ust 11, 1953, a copy of which is annexed to the motion apers of the plaintiff in Action No. 1, pursuant to the erms of which the plaintiffs agreed that they need not erve any answers to each others complaint.

Thereafter, Ada C. Bottone, who had been named as a defendant in both of the above-entitled lien foreclosure actions made a motion for an order, pursuant to Section 287 of the Civil Practice Act interpleading and substituting the United States of America as a defendant in said actions in her place and stead, upon depositing with the County Clerk of Westchester County the sum of $2,200.00. On July 28, 1954 an order was signed and entered by Hon. Arthur D. Brennan, one of the Justices of this Court, granting the motion by Ada C. Bottone and directing that upon her depositing $2,200.00 with the County Clerk of Westchester County, she shall be discharged from liability to the lienors or the Government and that the United States of America was substituted as a defendant in both actions in the place of the defendant, Ada C. Bottone.

[fol. 65] Thereafter and on September 30, 1954 our attorney received from the United States' attorney a copy of an answer on behalf of the defendant, United States of America.

On May 5, 1954 the attorneys for the plaintiffs in the above-entitled lien foreclosure action and the attorneys for the defendant, Fleetwood, entered into a stipulation providing that the above-entitled actions be tried and heard together without consolidation, pursuant to the provisions of Section 96-a of the Civil Practice Act, and on May 17, 1954 Hon. Frank H. Coyne, one of the Justices of this Court, signed and entered an order directing that the above-entitled lien foreclosure actions be tried and heard together, in accordance with the provisions of Section 96-a of the Civil Practice Act.

The aforesaid lien and claim of Colonial has not been paid, waived, cancelled, satisfied or discharged.

The question to be decided in the above-entitled actions is who is entitled to priority as between the lienors and the Government. If the lienors are entitled to priority then they are entitled to share pro rata the $2,200.00 deposited by owner, Ada C. Bottone, with the County Clerk of Westchester County.

Section 13 Subdivision I of the Lien Law of the State of New York provides that " * * * persons shall have no priority on account of the time of filing their respective

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notices of liens, but all liens shall be on a parity * * * ".
[fol. 66] We also call the Court's attention to the following pertinent facts:

On July 8, 1952 Ada C. Bottone acquired title to the premises involved in the above-entitled actions by deed from Agatha M. Dumas and Florence Catillag, dated July 7, 1952 and recorded in the office of the County Clerk of Westchester County on July 10, 1952 in Liber 5115 of Conveyances, Page 163.

The claims of the defendant, United States of America hereinafter referred to as "Government" as asserted in its answer, arose out of the filing of two different assessment lists with the Collector of Internal Revenue in and for the District of Albany, State of New York. The first assessment list was received by the said Collector on December 27, 1951 for the sum of $4,420.67 plus interest in the sum of $44.03. The second assessment list was received by the said Collector on March 21, 1952 in the sum of $3,136.87, plus interest in the sum of $31.24. The Government in its answer alleges that it received on account of its assessment on December 27, 1951 the sum of $4,109.40. It further alleges that on October 31, 1952 it filed a tax lien for the sum of $5,632.81 in the office of the said Clerk of the City of Mount Vernon which tax lien covered the assessments hereinabove referred to.

It is to be noted that at the time the Government made and filed its assessment lists with the Collector of Internal Revenue, Ada C. Bottone had not yet purchased or acquired title to the real estate involved in this action.

[fol. 67] It was not until sometime after July 7, 1952 that Ada C. Bottone contracted with Fleetwood, pursuant to the terms of which Fleetwood agreed to make certain improvements to the real property involved in this action and it was not until after July 7, 1952 (when Ada C. Bottone became the owner of the said real property) that Fleetwood performed any labor or furnished any materials or that the lienors herein performed labor or furnished materials for the improvement of the aforesaid real property.

Between August 7, 1952 and October 8, 1952 Colonial sold and delivered materials for various jobs to Fleetwood amounting to $2,042.93. Thereafter it instituted an action

in the Supreme Court, Westchester County against Fleetwood for the said amount and on January 8, 1953 Colonial received a judgment against Fleetwood which was entered in the Office of the County Clerk of Westchester County, on January 8, 1953 for the sum of $2,109.43.

With respect to the lien of Colonial for the sum of $896.25 the original delivery tickets signed by representatives of Fleetwood at the time the said materials were delivered to the real property involved in this action will be exhibited to the Court on the argument of this motion, and are referred to and made part hereof as if fully and at length set forth herein.

The owner, Ada C. Bottone, was at the time of the filing of the Mechanic's Liens and the Government's Tax Liens, a resident of Pelham Manor and resided at 1075 Pelhamdale [fol. 68] Avenue, Pelham Manor, New York. The real property involved in this action was and still is located in the Town of Eastchester, Westchester, New York.

In view of the Government's failure to comply with the provisions of Section 240 of the Lien Law of the State of New York, in that it failed to file its tax lien with the County Clerk of Westchester County, the Government's Lien is subject and subordinate to the Mechanic's Liens filed by the plaintiffs in the above-entitled actions.

Wherefore, Colonial Sand & Stone Co., Inc. asks that it be granted the relief prayed for in the annexed notice of motion, for which no previous application has been made.

Michael A. Iorio

(Sworn to by Michael A. Iorio on January 27, 1955.)

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In the Supreme Court of New York
County of Westchester

Notice of Cross-Motion of Defendant United States of America in Actions No. 1 and No. 2

Sirs:

Please Take Notice that upon the pleadings herein and the affidavit of J. Donald McNamara, duly sworn to February 11, 1955 and on the papers heretofore filed, and proceedings heretofore had herein, defendant, United States [fol. 69] of America, will make a cross-motion at Special Term Part I of the Supreme Court, Westchester County, at the Court House in the City of White Plains, on the 16th day of February, 1955 at 10:00 A. M., or as soon thereafter as counsel can be heard, for an order granting summary judgment to defendant, United States of America, pursuant to Rule 113 of the Rules of Civil Practice, on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

Dated: New York, N. Y., February 11, 1955.

Yours, etc.,

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant, United States of America.

To: All Counsel of record.

[fol. 70]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

AFFIDAVIT OF J. DONALD MCNAMARA, READ IN SUPPORT OF CROSS-MOTION OF DEFENDANT UNITED STATES OF AMERICA IN ACTIONS NO. 1 AND NO. 2

State of New York,
County of New York—ss.:

J. Donald McNamara being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney, in the Office of J. Edward Lumbard, United States Attorney for the Southern District of New York, attorney for defendant United States of America; that he is familiar with the facts of this matter; and that he is authorized to make this affidavit.

2. Deponent makes this affidavit in support of the cross-motion for summary judgment of defendant, United States of America.

3. On December 27, 1951, the Collector of Internal Revenue, Albany District, received an assessment of withholding taxes, plus interest, based on wages paid by defendant Fleetwood Paving Corp., Mount Vernon, New York, in the amount of $4,464.70 from the Commissioner of Internal Revenue, United States Treasury Department.

[fol. 71] 4. On March 21, 1952, the Collector of Internal Revenue, Albany District, received an assessment of withholding taxes, plus interest, based on wages paid by defendant, Fleetwood Paving Corp., Mount Vernon, New York, in the amount of $3,168.11 from the Commissioner of Internal Revenue, United States Treasury Department.

5. Attached hereto and made a part hereof is a certified copy of Certificate of Assessments and Payments, Treasury Department Form 899, marked Exhibit "A", which shows an unpaid balance due on taxes and interest owed by Fleetwood Paving Corp., in the sum of $3,523.41.

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6. On October 31, 1952, the Collector of Internal Revenue, Albany District, filed a written Notice of Federal Tax Lien(s) under Internal Revenue Laws, in the amount of $5,632.81 in the office of the City Clerk of the City of Mount Vernon, New York, wherein liens were claimed on behalf of the United States on all property and rights to property belonging to the defendant, Fleetwood Paving Corp. These liens covered each of the assessments referred to above in paragraphs 4 and 5, plus unassessed interest and penalties.

7. Attached hereto and made a part hereof is a certified copy of Notice of Federal Tax Lien(s) under Internal Revenue Laws, Treasury Department Form 668, marked Exhibit "B", which was filed with the City Clerk of the City of Mount Vernon, New York.

[fol. 72] 8. Accordingly, pursuant to Title 26, United States Code, Sections 3670, 3671 and 3672, the claim of defendant, United States, is first in time and, therefore, first in priority.

Wherefore, defendant United States respectfully requests that an order be entered granting summary judgment to it and directing the County Clerk, County of Westchester, to pay over to it the sum of $2200.

J. Donald McNamara, Assistant U. S. Attorney.

(Sworn to by J. Donald McNamara on February 11, 1955.)

EXHIBIT "A", ANNEXED TO AFFIDAVIT OF J. DONALD MCNAMARA

Certified copy of Certificate of Assessments and Payments, Treasury Department Form 899.

(See Opposite) ☞

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Form 809
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Exhibit "A", Annexed to Affidavit of J. Donald McNamara

# CERTIFICATE OF ASSESSMENTS AND PAYMENTS

OFFICE OF Director OF INTERNAL REVENUE
Albany, N. Y.
DISTRICT OF ....

In re: Fleetwood Paving Corp.
(Name of taxpayer)
720 So. Columbus Ave.
Mt. Vernon, N.Y.

TO THE COMMISSIONER OF INTERNAL REVENUE:
ATTENTION:
(Refer to symbols and date of letter requesting this certification)

The following is a transcript of the records of this office covering the accounts of the taxpayer named above in respect to WFT
(Character of tax)
for the 9/30 and 12/31/51
(Period covered)

| 1. Tax-able Period | 2. Law and Year | 3. Asst. No. or Page and Line | 4. Amount Assessed | | 5. Date of Payment or Check No. | 6. Amount | | 7. Pay. Ac. Cr. | 8. Assessments or Overassessments |
|---|---|---|---|---|---|---|---|---|---|
| 9/30/51 | 12/51 | 5670 | T 4420 | 67 | 7/10/52 | 1000 | 00 | Pd | Bal. $355.30 ✓ |
| | | | I 44 | 03 | 10/8/52 | 500 | 00 | " | 23C 12/27/51 |
| | | | | | 11/5/52 | 500 | 00 | " | 17 1/10/52 |
| | | | | | 5/18/53 | 2109 | 40 | " | 21 2/8/52 |
| | | | | | | | | | 69 #2701535 4/1/52 |
| | | | | | | | | | 668 10/31/52 |
| 12/31/51 | 3/52 | 6390 | T 3136 | 87 | | | | | Bal. $3168.11 ✓ |
| | | | I 31 | 24 | | | | | 23C 3/21/52 |
| | | | | | | | | | 17 4/9/52 |
| | | | | | | | | | 21 5/14/52 |
| | | | | | | | | | 69 #2703459 6/13/52 |
| | | | | | | | | | 668 10/31/52 |

I CERTIFY that the foregoing transcript of the accounts of the taxpayer named above in respect to the taxes specified, is true and complete for the period stated, and that all assessments and payments of tax, penalty and interest, and all abatements, credits, and refunds pertaining thereto as disclosed by the records of this office, are shown therein.

Date of certificate July 21, 1953, 19

Director Collector of Internal Revenue

C:AB:MSP

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[fol. 74]

EXHIBIT "B", ANNEXED TO AFFIDAVIT OF J. DONALD MCNAMARA

September 29, 1954

Pursuant to the provisions of Section 1733, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States) I hereby certify that annexed is a true copy of notice of Federal Tax lien #9155, filed by this office, the Albany District of New York, in the office of the City Clerk, Mt. Vernon, N. Y., on the 31st day of October, 1952.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed on the day and year first above written.

R. J. RATTERREE
District Director of Internal Revenue

(Seal)

(See Opposite) ☞

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Exhibit "B", Annexed to Affidavit of J. Donald McNamara

Form 668
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised Nov. 1952

No. 9155

# NOTICE OF FEDERAL TAX LIEN(S) UNDER INTERNAL REVENUE LAWS

COPY
ed

UNITED STATES INTERNAL REVENUE,

Albany, N.Y. DISTRICT

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit: Personal Property

Name of taxpayer Fleetwood Paving Corp.

Residence or place of business Carleton Avenue
Mt. Vernon, New York

| NATURE OF TAX | YEAR OR TAXABLE PERIOD | DATE ASSESSMENT LIST RECEIVED | AMOUNT OF ASSESSMENT |
|---|---|---|---|
| Withheld Federal | 9/30/51 | 12/27/51 | $ 2464.70 |
| Withheld Federal | 12/31/51 | 3/21/52 | 3168.11 |
| | | | |
| | | | |
| | | | |
| | | TOTAL | $ 5632.81 |

WITNESS my hand at Albany, New York, on this,

the 29th day of October, 1952

(signed) R. J. Batterree
Director of Internal Revenue.

City Clerk
Mt. Vernon, New York

By
Internal Revenue Agent.

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien(s). G. C. M. 26419, 1950-1 C. B., 125.)

16-67420-6

[fol. 76]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

OPINION OF BRENNAN, *J.*

In the above actions brought to foreclose two mechanic's liens affecting the same premises, each of the parties appearing therein (other than the general contractor who has defaulted in pleading) has moved for summary judgment.

There appear to be no triable issues of fact present. It is conceded that Home Maintenance Company, a subcontractor, has a valid lien for $1,400 and that Colonial Sand & Stone Co., Inc., a materialman, has a valid lien for $896.25. In addition, it is not disputed that Ada Bottone, the owner of the subject premises, owed a balance of $2,200 to the general contractor, Fleetwood Paving Corporation, and said owner has paid said balance into court to the credit of these actions.

The sole question presented is whether the aforesaid subcontractor and materialman who filed their respective liens on November 3, 1952, and on November 10, 1952, are entitled to their proportionate shares of the said fund now on deposit or whether the interpleaded defendant, United States of America, is entitled to said deposit by virtue of certain federal withholding assessments and liens owed by the general contractor, Fleetwood Paving Corporation, on which there remains an unpaid balance of $3,523.41. These assessments were made during December of 1951, and March of 1952; notice of said liens was filed on October 31, 1952, in the office of the City Clerk of the City of Mount Vernon, N. Y. (in which city the general contractor maintained its office); and on December 5, 1952, a levy based [fol. 77] on said tax liens was served on the owner, Bottone. At no time were said tax liens filed in the office of the Clerk of Westchester County, in which county the subject real property is located. The federal government contends that its aforesaid tax liens have priority over and are superior to the mechanic's liens of the aforementioned subcontractor and materialman and that it is therefore entitled to the fund on deposit herein.

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In this court's view, the situation presented at bar is governed by the rule laid down in *Cranford Company* v. *L. Leopold & Company* (189 Misc., 388, 70 N. Y. Supp., 2d, 183, aff'd 273 App. Div., 754, 75 N. Y. Supp., 2d, 512, aff'd 298 N. Y., 676). In the cited case, involving a public improvement, it was held that moneys due and payable for such an improvement are a trust fund for the payment of the proper expenses of construction; that a mechanic's lien attaches to the debt; and that a mechanic's lienor is, to the extent of his interest, a statutory assignee and is protected unless and until notice of the tax lien of the United States is filed in the proper office. The careful reasoning of the *Cranford* case has recently been followed in *Bain* v. *Caruso-Sturcey Corporation* (134 N. Y., Supp., 2d, 246 [involving a public improvement]), and in *United States* v. *Preferred Contractors* (122 Fed. Supp., 219 [involving a private improvement]). In the light of the present provisions of sections 36-a, 13(7) and 56 of the Lien Law, this court holds that the rule in the Cranford case applies, with equal force, to a private improvement. Fur-
[fol. 78] ther, this court holds that the instant tax liens of the government, in order to be effective against the subject realty and the moneys due for the improvement thereof were, under the provisions of section 3672 of the Internal Revenue Code and section 240 of the Lien Law, required to be filed in the Office of the Clerk of Westchester County. Since the government's liens were not filed in said county clerk's office and the liens of the subcontractor and the materialman were filed in that office, it follows that the two last mentioned liens (which, as stated above, exceed the balance due from the owner) are superior to the tax liens.

Accordingly, the motion of the subcontractor and the cross-motion of the materialman are granted and the cross-motion of the government is denied. The subcontractor and the materialman shall share, pari passu, in the fund on deposit.

Settle order and judgment on notice.

[fol. 79]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

STIPULATION WAIVING CERTIFICATION—October 26, 1955

It Is Hereby Stipulated and Agreed that the foregoing are true and correct copies of the notice of appeal, order and judgment appealed from and all the papers used before the Court below in making the order and judgment appealed from herein and the whole thereof which are on file in the Office of the Clerk of the Supreme Court, Westchester County, and certification of same is hereby waived pursuant to Section 170 of the Civil Practice Act.

Dated, October 26, 1955.

Paul W. Williams, United States Attorney, Attorney for Defendant-Appellant.

Charles S. Friedman, Attorney for Plaintiffs-Respondents in Action No. 1 and Defendant-Respondent in Action No. 2.

Jacob I. Goodstein, Attorney for Defendant-Respondent in Action No. 1 and Plaintiff-Respondent in Action No. 2.

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[fol. 81]

NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

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Action No. 1

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of HOME MAINTENANCE CO., Plaintiffs-Respondents,

—against—

UNITED STATES OF AMERICA, Defendant-Appellant,

—and—

FLEETWOOD PAVING CORPORATION, Defendant,

—and—

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

---

Action No. 2

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

—against—

UNITED STATES OF AMERICA, Defendant-Appellant,

—and—

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

—and—

HOME MAINTENANCE COMPANY, Defendant-Respondent.

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NOTICE OF APPEAL TO COURT OF APPEALS

Sirs:

Please Take Notice that pursuant to the leave granted by the Court of Appeals of the State of New York in both [fol. 82] Action No. 1 and Action No. 2 above, by an order duly made and entered in the office of the Clerk of that

Court on the 29th day of November, 1956, the United States of America, Defendant-Appellant, in both Action No. 1 and Action No. 2 above, hereby appeals to the Court of Appeals from each and every part of the order of the Appellate Division, Second Department, duly entered in the office of the Clerk of the Appellate Division, Second Department, on the 2nd day of July, 1956, affirming an order and judgment (one paper) of the Supreme Court, County of Westchester, duly entered in the office of the Clerk of the County of Westchester on the 28th day of March, 1955.

Dated: New York, N. Y., December 28, 1956.

Yours, etc.,

Paul W. Williams, United States Attorney for the Southern District of New York, Attorney for Defendant-Appellant, United States of America, Office & Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

[fol. 83] To: Jacob I. Goodstein, Esq., Attorney for Defendant-Respondent and Plaintiff-Respondent, Colonial Sand and Stone Co., Inc., Office & Post Office Address: 21 East 40th Street, New York 16, N. Y.

Charles S. Friedman, Esq., Attorney for Plaintiffs-Respondents and Defendants-Respondents, Robert Aquilino and Joseph Spero, co-partners doing business as Home Maintenance Co., Office & Post Office Address: 10 Fiske Place, Mount Vernon, N. Y.

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[fol. 84]

IN COURT OF APPEALS

ORDER OF COURT OF APPEALS GRANTING LEAVE TO APPEAL—November 29, 1956

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Mo. No. 469

ROBERT AQUILINO & ano., co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

and another action

---

[fol. 85] A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A Copy

Gearon Kimball, Deputy Clerk.

(Seal)

[fol. 86]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

ORDER OF APPELLATE DIVISION DENYING LEAVE TO APPEAL—August 13, 1956

Present—Hon. Gerald Nolan, Presiding Justice. Hon. Charles E. Murphy, Hon. Henry L. Ughetta, Hon. James T. Hallinan, Hon. Philip M. Kleinfeld, Justices.

---

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

(Action No. 1)

---

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

and

HOME MAINTENANCE COMPANY, Defendant-Respondent.

(Action No. 2)

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fol. 87] The above named United States of America, the efendant-appellant in the above entitled Actions No. 1 nd 2, having made a motion for leave to appeal to the ourt of Appeals; and the motion having been duly sub-itted.

Now on reading and filing the papers in support of and opposition to said motion; and all the papers upon hich the appeal was heard; and due deliberation having een had thereon:

It is Ordered that the said motion be and the same hereby denied.

Enter:

John J. Callahan, Clerk.

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Notice of Entry

r:—

Please take notice, that the within is a copy of an order is day duly entered herein and filed in the office of the erk of the Appellate Division, Second Department.

Dated, Mt. Vernon, N. Y., August 13, 1956.

Yours, etc.,

Harold M. Edwards, Attorney for Respondent, Office and Post Office Address, 10 Fiske Place, Mount Vernon, N. Y.

To: Paul W. Williams, Esq., United States District torney, United States Court House, Foley Square, New rk, N. Y.

[fol. 88]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

ORDER APPEALED FROM—July 2, 1956

Present—Hon. Gerald Nolan, Presiding Justice. Hon. Henry G. Wenzel, Jr., Hon. Charles E. Murphy, Hon. James T. Hallinan, Hon. Philip M. Kleinfeld, Justices.

---

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

(Action No. 1)

---

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

and

HOME MAINTENANCE COMPANY, Defendant-Respondent.

(Action No. 2)

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[fol. 89] The above named, United States of America, defendant in the above entitled actions No. 1 and 2, having appealed to the Appellate Division of the Supreme Court from an order and judgment (one paper) of the Supreme Court, entered in the office of the Clerk of the County of Westchester on the 28th day of March, 1955, granting motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, and denying cross motion of said defendant, United States of America for summary judgment; striking out the answers of said defendant, and adjudging that the plaintiffs in Action No. 1 have a valid lien for the sum of $1400.00 against a certain fund, and that the plaintiff in Action No. 2 has a valid lien against said fund for the sum of $896.25, etc., herein, and the said appeal having been argued by Mr. Maurice N. Nessen, Assistant United States Attorney, of Counsel for defendant-appellant United States of America, and argued by Mr. Harold M. Edwards of Counsel for plaintiffs-respondents Aquilino and Spero, and argued by Mr. Isidore Zamore of Counsel for defendant-respondent and plaintiff-respondent Colonial Sand and Stone Co., Inc., and due deliberation having been had thereon; and upon the opinion [fol. 90] and decision slip of the Court herein, heretofore filed:

It is Ordered and Adjudged that the order and judgment (one paper) so appealed from, be and the same hereby is unanimously affirmed, without costs.

Enter:

John J. Callahan, Clerk.

[fol. 91]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

OPINION OF APPELLATE DIVISION

By Nolan, P.J.; Wenzel, Murphy, Hallinan and Kleinfeld, JJ.

*Aquilino, &c., plf-res,* v. *United States, ap* (*Fleetwood Paving Corp'n, def; Colonial Sand & Stone Co., Inc., def-res; Action No. 1*); *Colonial Sand & Stone Co., Inc., plf-res,* v. *United States, ap* (*Mario's Miramare Restaurant and ano., def; Home Maintenance Co., def-res; Action No. 2*)—In two actions brought respectively by respondents Aquilino and Spero, co-partners, and Colonial Sand & Stone Co., Inc., to foreclose mechanics' liens against real property owned by one Ada Bottone, named as a defendant therein, the appeal is by the United States of America from an "order and judgment," which granted motions made by respondents for summary judgment, pursuant to Rule 113 of the Rules of Civil Practice, denied the cross-motion of appellant for summary judgment, and directed the county clerk of Westchester County to pay over to respondents the money deposited by Bottone to discharge the liens against her property, pursuant to section 20 of the Lien Law.

Order and judgment unanimously affirmed, without costs.

Respondents are sub-contractors who contracted with defendant Fleetwood Paving Corporation, the general contractor, to furnish labor and materials for the improvement of the real property owned by Bottone. It is conceded that by the filing of their respective notices of mechanic's liens they acquired valid liens against the real property to the [fol. 92] extent of the amount earned by, and unpaid to, Fleetwood. It was not disputed that Bottone owed a balance of $2,200 to Fleetwood which she deposited in court to the credit of the actions. Appellant is the holder of liens against the property of Fleetwood by virtue of assessments for unpaid Federal taxes. Fleetwood had withheld wages from its employees for taxes, but had failed to turn over the money to the government. The assessments against Fleet-

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wood were included in lists received in the office of the director of Internal Revenue, District of Albany, prior to the time when Fleetwood contracted with Bottone and, of course, prior to the time when Fleetwood was the owner of any claim against Bottone. A notice of federal tax lien was filed by appellant against Fleetwood in the office of the clerk of the City of Mount Vernon, prior to the time when respondents' notices of lien were filed, but after respondents had funished (sic) labor and material for the improvement of the real property involved. By the order and judgment appealed from priority was given to respondents' liens against the real property of Bottone, over the liens of appellant, which it was asserted attached to the debt owed by Bottone to Fleetwood. Appellant claimed no lien against the real property involved, nor against any property of respondents. The rationale of the determination at Special Term is that respondents, by virtue of their respective notices of lien, became statutory assignees of Bottone's indebtedness to Fleetwood and were protected [fol. 93] against the lien asserted by appellant until its notice of lien was filed in the proper office, which was held to be the office of the clerk of the County of Westchester. While it may be doubtful that appellant would have acquired any greater rights, or any rights whatever, by filing a notice of lien in the county clerk's office, since it had, and claimed, no lien against real property (Lien Law, sec. 240) or that respondents were, in a strict legal sense, the assignees of the indebtedness of Bottone to Fleetwood, we do not find it necessary to determine those questions. It may be assumed that appellant's notice of lien was properly filed, if indeed any filing was necessary as against respondents, or at least against respondents Aquilino and Spero, who are not judgment creditors (U. S. Code, tit. 26, secs. 3670, 3671, 3672, subdiv. [a]) and that its lien attached, as it asserts, to the debt owed by Bottone to Fleetwood. However, no such indebtedness existed when the assessment lists were received by the collector and, when the indebtedness now claimed by appellant arose, it was based upon labor performed and material furnished by respondents. In our opinion, there is, at present, no debt due from Bottone to Fleetwood, to which appellant's lien may attach.

When respondents furnished labor and material for the improvement of Bottone's property with her consent, and thus enhanced its value, they acquired an interest therein to the extent of the value of the labor and materials furnished, subject to the limitation provided by section 4 of the Lien Law and, by filing their notices of lien, perfected [fol. 94] their inchoate rights to such interest (see *John P. Kane Co.* v. *Kinney*, 174 N. Y., 69, 73; *Schaghticoke Powder Co.* v. *The Greenwich & Johnsonville R'y Co.*, 183 N. Y., 306, 310; *Rapid Fireproof Door Co.* v. *Largo Corp'n*, 243 N. Y., 482, 486). Having commenced actions to enforce their liens, they are entitled to judgment thereon, pursuant to the provisions of the Lien Law. Section 56 of that statute provides that any judgment rendered in an action to enforce such a lien shall provide for payment to the lienor out of the proceeds of sale of real property, before any part of the proceeds shall be paid to the person for whom the lienor had performed labor or furnished materials. The funds deposited by Bottone were in this case substituted for her property, and must be distributed by the judgment in the same manner as if they were the proceeds realized on its sale. Appellant had no lien against the real property involved, nor does it have any lien upon the funds deposited in substitution therefor. Were it not for appellant's lien against the debt owed by Bottone to Fleetwood, Fleetwood would be entitled only to the balance of the money on deposit, after payment of the amounts necessary to discharge respondents' liens. Appellant, under the circumstances disclosed, is in no better position than Fleetwood would have been, if its right to recover against Bottone had not been subjected to appellant's lien.

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[fol. 95]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF APPEALS

It Is Hereby Stipulated and Agreed pursuant to Section 170 of the Civil Practice Act that the foregoing are true and correct copies of the Record on Appeal to the Appellate Division, Second Department, the Notice of Appeal to Court of Appeals, the Order of Court of Appeals granting leave to appeal, the Order of Appellate Division denying leave to appeal, the Order of Appellate Division appealed from, and the Opinion of Appellate Division.

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[fol. 98]

IN THE COURT OF APPEALS OF NEW YORK

Robert Aquilino et al., Copartners Doing Business under the Name of Home Maintenance Co., Respondents, v. United States of America, Appellant, et al., Defendant, and Colonial Sand and Stone Co., Inc., Respondent. (Action No. 1.)

Colonial Sand and Stone Co., Inc., Respondent, v. United States of America, Appellant, et al., Defendants, and Home Maintenance Company, Respondent. (Action No. 2.)

Argued October 10, 1957; Decided December 5, 1957.

OPINION OF THE COURT OF APPEALS

Fuld, J. This appeal, here by our permission, involves he relative priority between a mechanic's lien and a federal ax lien.

Fleetwood Paving Corporation owes the United States Government a sum of money representing unpaid withholding and social security taxes. In December, 1951 and March, 952, the local collector received assessment lists including ssessments against the taxpayer. Some short time later, Fleetwood, as general contractor, entered into an agreeent with one Ada Bottone to remodel a restaurant which he owned in the Town of Eastchester. Thereafter, in

August and September of that same year, 1952, Fleetwood arranged for Home Maintenance Company and Colonial Sand and Stone Company to furnish labor and materials for the remodeling job.

On October 31, 1952, the United States filed a lien against Fleetwood for its unpaid taxes (amounting on that date, with penalties and interest, to over $5,000) in the office of the clerk of the City of Mt. Vernon, where Fleetwood maintained its place of business. Some days later, having been paid only a part of what was due them, Home Maintenance and Colonial Sand filed mechanic's liens in the county clerk's office against the Bottone property for the balance owing, the former for $1,400, the latter for $896.25. In January, 1953, Colonial Sand obtained a judgment for $2,109.43 for materials sold on a number of Fleetwood jobs.

[fol. 99] In June, 1953, separate suits were started by Home Maintenance and Colonial Sand to foreclose their respective liens and Bottone deposited $2,200, the amount still owing by her to Fleetwood, with the county clerk to the credit of both actions. On Bottone's motion, the government, which had levied against her indebtedness to Fleetwood, was interpleaded and substituted as defendant in her place.

Each of the three parties, the two plaintiffs and the government, moved for summary judgment under rule 113 of the Rules of Civil Practice. The court at Special Term granted plaintiffs' motions on the ground that the government's tax lien was ineffective since it had not been filed in the county clerk's office, the place designated by statute for the recording of liens against real property. Although the Appellate Division affirmed the judgment, it disagreed with Special Term's rationale. It was the Appellate Division's view that no debt was due from Bottone to Fleetwood to which the government's lien could attach: the fund deposited by Bottone was a substitute for her real property and, since the United States had no lien against such property, it had no lien "upon the funds deposited in substitution therefor."

We cannot agree. On the basis of the controlling federal statute (Internal Revenue Code of 1939, U. S. Code, tit. 26, §§ 3670, 3672), as well as the federal decisions construing

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it, the government tax lien attached to the debt owing to Fleetwood and that lien is entitled to priority.

The Internal Revenue Code of 1939 provided, as does the present code, a lien of exceedingly broad scope in favor of the United States for unpaid taxes. The amount of the tax was to be "a lien * * * upon all property and rights to property" belonging to the taxpayer and the lien "shall arise at the time the assessment list was received by the collector [fol. 100] and shall continue until the liability for such amount is satisfied" (§§ 3670-3671). However, the statute went on to declare, "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector [in] the office * * * authorized by the law of the State * * * in which the property subject to the lien is situated" (§ 3672, subd. [a], par. [1]). By this state's law, the place provided for filing differs depending on whether the lien is asserted against real or personal property. In the case of a lien upon real property, the notice is to be filed in "the office of the clerk of the county in which real property subject to such lien is situated" (Lien Law, § 240, subd. 1), in the case of a lien upon personal property, "in the town or city where the owner * * * resides at the time the lien arises" (§ 240, subd. 2).

The "relative priority of the lien of the United States for unpaid taxes is," the Supreme Court has said, "always a federal question to be determined finally by the federal courts." (United States v. Acri, 348 U. S. 211, 213; United States v. Security Tr. & Sav. Bk., 340 U. S. 47, 49; Illinois v. Campbell, 329 U. S. 362, 371; United States v. Waddill Co., 323 U. S. 353, 356-357.) Turning, therefore, to the federal decisions, we find the rule firmly established that, once a government tax lien is properly filed, no subsequently recorded lien or claim may prevail against it. (See United States v. Colotta, 350 U. S. 808, revg. 224 Miss. 33; United States v. Acri, supra, 348 U. S. 211, 214; United States v. Liverpool & London Ins. Co., 348 U. S. 215, 217; United States v. Scovil, 348 U. S. 218, 220; United States v. New Britain, 347 U. S. 81, 84-87; United States v. Gilbert Associates, 345 U. S. 361, 365; United States v. Security Tr. &

Sav. Bk., supra, 340 U. S. 47, 50-51; United States v. Kings County Iron Works, 224 F. 2d 232, 234-235, 237.)

[fol. 101] In the case before us, the government concededly filed notice of its lien, in the office of the clerk of the city where the taxpayer resided, before the plaintiffs filed their notices and, since such notice of lien is indisputably effective against all personal property and rights thereto belonging to the taxpayer (Lien Law, § 240, subd. 2), decision herein depends solely on whether the indebtedness due to Fleetwood from Bottone constituted property of Fleetwood.

The lien filed by the government in October, 1952, before any mechanic's lien had been recorded, was manifestly not asserted against Bottone's real property or any realty possibly owned by the taxpayer. It was asserted against the contractual obligation of Bottone to Fleetwood, against Bottone's indebtedness to the latter, and, quite obviously, within the statutory terms, personal "property and rights to [such] property" belonging to the taxpayer (U. S. Code, tit. 26, § 3670; see United States v. Kings County Iron Works, supra, 224 F. 2d 232, 234-235, 237; cf. Fidelity & Deposit Co. v. New York City Housing Auth., 241 F. 2d 142, 144-145). Since the government did all that the applicable law demanded when it recorded its notice in the city clerk's office (Lien Law, § 240, subd. 2), its tax lien is superior to any other lien subsequently filed.

It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land. (See United States v. Vorreiter, 355 U. S. 15, revg. 134 Col. 543; United States v. White Bear Brewing Co., 350 U. S. 1010, revg. 227 F. 2d 359; United States v. Colotta, supra, 350 U. S. 808, revg. 224 Miss. 33; United States v. Scovil, supra, 348 U. S. 218, 220-221; United States v. New Britain, supra, 347 U. S. 81, 84-87; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237.) That being [fol. 102] so, it follows that the provision in this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed "trust funds" for the payment of subcontractors (§ 36-a; § 13, subd. [7])—may not be con-

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strued to affect the rights of the government or the priority of its tax lien.[1]

The Kings County Iron Works case (supra, 224 F. 2d 232), also involving the question of priority between the government's tax lien and a mechanic's lien in New York, is virtually indistinguishable from the present case. There, as here, a contractor, entitled to be paid by the owner of the real property which had been improved, owed money both to the United States for unpaid taxes and to his subcontractor for work performed. There, just as here, the subcontractor filed notice of its mechanic's lien against the property about a week after the government had filed notice of its tax lien at the place where the taxpayer-contractor maintained its place of business. There, too, the property owner paid the amount in question into court for judicial determination of priority between the government and the mechanic's lienor. The district court awarded the latter priority on much the same grounds as did the trial court herein (122 F. Supp. 219, sub nom. United States v. Pre-
[fol. 103] ferred Contrs.), but, on appeal, the Court of Appeals for the Second Circuit reversed. It held that the debt owing to the taxpayer was subject to federal levy and was subordinate to the federal tax lien for either of two reasons; on the one hand, because the government filed notice of its lien first and, on the other, because mechanic's lienors, not being within the class of persons protected by subdivision (a) of section 3672 of the Internal Revenue Code, are in no event entitled to challenge a federal tax lien.

Likewise, in the case before us, the government tax lien must be accorded priority for it too was recorded before either Home Maintenance or Colonial Sand filed notices of their respective liens and before Colonial Sand obtained its judgment. Moreover, since Home Maintenance never did become a judgment creditor, recent Supreme Court de-

[1] To the extent that Cranford Co. v. Leopold & Co. (189 Misc. 388, 391-392, affd. 273 App. Div. 754, affd. 298 N. Y. 676) suggests the contrary, it must give way to more recent federal decisions. (See United States v. Scovil, supra, 348 U. S. 218, 221; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 235 et seq.; and other cases cited above.)

cisions impel us to add that its lien would have been subordinate to the federal tax lien even if it had been earlier recorded. (See United States v. Vorreiter, supra, 355 U. S. 15; United States v. White Bear Brewing Co., supra, 350 U. S. 1010, revg. 227 F. 2d 359; see, also, United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237.)

The judgment of the Appellate Division should be reversed, and the motion of the United States for summary judgment in each action should be granted.

Chief Judge Conway and Judges Desmond, Dye, Froessel and Burke concur with Judge Fuld; Judge Van Voorhis dissents and votes to affirm.

Judgment reversed and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

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[fol. 104]

IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR—December 5, 1957

[fol. 105]

No. 106

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Action No. 1

ROBERT AQUILINO & ano., co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

(and another action)

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Be it Remembered, That on the 3rd day of April in the ear of our Lord one thousand nine hundred and fifty-seven, nited States of America, the defendant-appellant in both ctions, came here unto the Court of Appeals, by Paul W. illiams, its attorney-, and filed in the said Court a Notice Appeal and return thereto from the judgment of the ppellate Division of the Supreme Court in and for the econd Judicial Department. And Robert Aquilino & ano., -partners doing business under the firm name and style Home Maintenance Co., the plaintiffs-respondents in ction No. 1, and Colonial Sand and Stone Co., Inc., the fendant-respondent in Action No. 1 and the plaintiff-spondent in Action No. 2, and Home Maintenance Com-ny, the defendant-respondent in Action No. 2, afterwards peared in said Court of Appeals by Charles S. Friedman d Jacob I. Goodstein, their attorneys.

Which said Notice of Appeal and the return thereto, filed aforesaid, are hereunto annexed.

ol. 106] Whereupon, The said Court of Appeals having ard these causes argued by Mr. Daniel F. McMahon, of unsel for the appellant-, and by Mr. Harold M. Edwards, counsel for the respondents Aquilino and Spero, and omitted by the respondent Colonial Sand & Stone Co., ., and after due deliberation had thereon, did order and judge that the judgment of the Appellate Division of the preme Court appealed from herein be and the same reby is reversed and the matter remitted to Special Term further proceedings in accordance with the opinion ein.

And it was also further ordered, that the records afore-d, and the proceedings in this Court, be remitted to the d Supreme Court, there to be proceeded upon according aw.

l. 107] Therefore, it is considered that the said judg-nt be reversed &c., as aforesaid.

nd hereupon, as well the Notice of Appeal and return reto aforesaid as the judgment of the Court of Appeals resaid, by it given in the premises, are by the said rt of Appeals remitted into the Supreme Court of the te of New York before the Justices thereof, accord-to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

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[fol. 108]

IN COURT OF APPEALS OF NEW YORK

Present, Hon. Albert Conway, Chief Judge, presiding.

Mo. No. 195

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Action No. 1

ROBERT AQUILINO & ano., co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

(and another action)

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ORDER DENYING MOTION FOR REARGUMENT AND GRANTING MOTION TO AMEND REMITTITUR—April 15, 1958

A motion for reargument or, in the alternative, to amend the remittitur in the above causes having been heretofore made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

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Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further Ordered, that the said motion, insofar as it seeks amend the remittitur, be and the same hereby is granted. eturn of the remittitur requested and, when returned, it ll be amended by adding thereto the following:

"Upon the appeal herein, as the opinion of the Court indicates, there was presented and necessarily passed upon a question under the Constitution of the United States, namely, the construction of provisions of the Internal Revenue Code (U.S. Code, tit. 26, §§3670-3672). Plaintiffs argued that such provisions were not decisive or controlling. This Court held to the contrary."

ol. 109] And the Supreme Court, Westchester County, hereby requested to direct its Clerk to return said rettitur to this Court for amendment accordingly.

A copy

Gearon Kimball, Deputy Clerk.

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l. 112]

COURT OF APPEALS
OF THE STATE OF NEW YORK

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Action No. 1

BERT AQUILINO and JOSEPH SPERO, copartners doing business under the firm name and style of HOME MAINTENANCE CO., Plaintiffs-Respondents,

*against*

UNITED STATES OF AMERICA, Defendant-Appellant,

*and*

FLEETWOOD PAVING CORPORATION, Defendant,

*and*

ONIAL SAND AND STONE CO., INC., Defendant-Respondent.

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Action No. 2

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

*against*

UNITED STATES OF AMERICA, Defendant-Appellant,

*and*

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

*and*

HOME MAINTENANCE COMPANY, Defendant-Respondent.

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NOTICE OF MOTION

Sirs:

Please take notice, that upon the brief submitted herewith, the undersigned, will move this Court at a stated term [fol. 113] thereof pursuant to Rule XX of the Rules of the Court of Appeals to be held at the Court Room of this Court, Court of Appeals Hall, Eagle Street, Albany, New York on Monday, March 31, 1958, at the opening of the Court on that day for an order granting reargument of the appeal in the above entitled matter, and in the event that such reargument be denied, for an order amending the remittitur in the above entitled matter certifying the Federal question implicit herein to enable the respondents to petition to the Supreme Court of the United States for a writ of certiorari in the form set forth in the annexed memorandum, and for such other and further relief as to the Court may seem just and proper.

Dated: March 19, 1958.

Yours, etc.,

Charles S. Friedman, Attorney for Respondents, Robert Aquilino and Joseph Spero, Office and P. O. Address, 10 Fiske Place, Mount Vernon, New York.

Jacob I. Goodstein, Attorney for Respondent, Colonial Sand and Stone Co., Inc., Office and P. O. Address, 21 East 40th Street, New York, New York.

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To: Paul W. Williams, Esq., Attorney for Appellant, United States of America, Office and P. O. Address, United States Court House, Foley Square, New York, New York.

[fol. 114]

COURT OF APPEALS
OF THE STATE OF NEW YORK

Action No. 1

ROBERT AQUILINO and JOSEPH SPERO, copartners doing business under the firm name and style of HOME MAINTENANCE CO., Plaintiffs-Respondents,

*against*

UNITED STATES OF AMERICA, Defendant-Appellant,

*and*

FLEETWOOD PAVING CORPORATION, Defendant,

*and*

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

Action No. 2

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

*against*

UNITED STATES OF AMERICA, Defendant-Appellant,

*and*

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

*and*

HOME MAINTENANCE COMPANY, Defendant-Respondent.

BRIEF IN SUPPORT OF MOTION FOR REARGUMENT AND IN THE ALTERNATIVE FOR AN ORDER AMENDING THE REMITTITUR

The above entitled appeal was decided by this Court on December 5, 1957 and the opinion of the Court by Judge

[fol. 115] Fuld is reported in 3 N. Y. 2d 511. The order of this Court has not as yet been carried out at Special Term due to the present motion for reargument and for leave to amend the remittitur.

Reargument

Respondents seek reargument upon the ground that the defendant Fleetwood Paving Corporation had, at no time, a right to property within the statutory meaning of United States Code, Title 26, Sec. 3670. The Court has stated the issue in this case in its opinion as follows:

> "Decision herein depends solely on whether the indebtedness due to Fleetwood from Bottone constituted property of Fleetwood".

The Court then assumes that the lien of the government was asserted "against the contractual obligation of Bottone to Fleetwood against Bottone's indebtedness to the latter, and, quite obviously within the statutory terms, personal 'property and rights to (such) property' belonging to the taxpayer".

The Court, by citing Federal cases which purport only to classify for Federal purposes fundamental interests created by the law of the State of New York, assumes without further comment that such an interest exists under local law which a court may classify as "property and rights to (such) property" within the terms of Title 26, Sec. 3670, United States Code. In making this assumption, respondents feel that the court overlooked their fundamental argument that no such interests exist under New York Law (respondent Aquilino's brief, pp. 9-16).

[fol. 116] As a supplemental argument to clarify respondents' point it is believed that the court misconstrued the holding of the Second Circuit in *United States* v. *Kings County Iron Works*, 224 F. 2d 232. That decision was based upon a determination that New York Law created interests in the taxpayer which, under Federal scrutiny when applying a Federal statute, constituted "property or right to (such) property". Judge Medina in *Fidelity and Deposit Co. of Maryland* v. *New York City Housing Authority*, 241

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F. 2d 142, at pages 144-145 said "the court did not inquire whether the state had created a right. It assumed that it did, and was concerned with the 'relative priority of a Federal tax lien and a mechanic's lien under state law'. *United States* v. *Kings County Iron Works, supra,* at page 234." It is the function of this Court, and its sole prerogative, to determine that which the Court in *United States* v. *Kings County Iron Works,* assumed; namely, whether under State law a right has been created. In the language of Judge Dimock in his opinion following Judge Medina's ruling (*Fidelity and Deposit Co. of Maryland* v. *New York City Housing Authority* on remand from the Circuit Court of Appeals, 157 F. Supp. 87) "The nature of the interest of the contractor, as distinguished from the priority of the government, was to be determined by the law of the State of New York".

Since respondents believe that the scope and effect of relevant Federal decisions are best determined by reference to succeeding Federal decisions, especially those of the same court which rendered the original decision, the view expressed in the *Fidelity and Deposit Company of Mary-*
[fol. 117] *land* case should govern, at least to the extent of inquiring first whether an interest in the property exists in favor of the taxpayer under the New York law.

The respondents contend that no interest in the property involved existed under the law of the State of New York in favor of the defendant Fleetwood Paving Corporation, and that therefore there is no "property or right to (such) property" to which a Federal tax lien can attach under United States Code, Title 26, Sec. 3670.

Under Section 3 of the New York State Lien Law the subcontractor is given a lien upon the real property improved with the consent or at the request of the owner or his agent or contractor, effective from the time of filing. Section 4 sets forth the extent of the lien. The above sections make it clear that from the time of filing the subcontractor possessing a mechanic's lien has the sole right to payment under the contract to the extent that the agreed price or value has not yet been paid. See also Section 56, New York Lien Law.

To the extent that the contractor has been paid under the contract, he holds such payment in trust for the benefit

of subcontractors. If he uses the proceeds for any other purpose, he commits larceny (Lien Law, Sec. 36a). It is anomalous to maintain that the contractor has a beneficial interest in property which he cannot use for his own benefit without committing larceny. The New York State Joint Legislative Committee, when recommending enactment of Section 36a, indicated their view as follows:

> [fol. 118] "These amendments are recommended for the reason that * * * the present section * * * does not offer any protection to laborers and materialmen * * * who have not filed liens prior to such diversion" (Legislative Document No. 72, 1930, Vol. 19).

Since a contractor who "diverts" from its true owners funds in his possession belonging to them is guilty of a crime, it follows that the contractor, owing to a subcontractor acts only as a conduit for the purpose of conveying the property to the beneficial owner.

The reasoning above set forth is implicit in decisions under the Bankruptcy Act (United States Code, Title 11, Sec. 107). Under that Act the mechanic's lienor under New York law is entitled to have his property set aside from the other assets of the bankrupt even though his lien is not filed (*Wickes Boiler Co., Inc.* v. *Godfrey-Keeler Co.*, 121 F. 2d 415). Judge Augustus Hand in that case indicated that even though the lien is not filed the laborer or materialman is the beneficial owner of a valid trust established under Section 36a of the New York Lien Law (see also *Wade* v. *Nassau Lumber and Supply Co.*, 275 App. Div. 864).

In its opinion this Court stated that in so far as *Cranford Co.* v. *Leopold Co.*, 189 Misc. 388, aff'd 273 App. Div. 754, aff'd 298 N. Y. 676, was inconsistent with relevant Federal decisions, it must yield. The Court is saying that, although under New York law the mechanic's lienor is a statutory assignee of the fund created by Section 36a, New York Lien Law, he is not made thereby a purchaser within the terms of the Federal tax act. Nevertheless the mechanic's [fol. 119] lienor is still a statutory assignee of the fund and as such has sole interest in the property. His interest arose

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when he performed the work, and his toil was the very thing which gave rise to an obligation on the part of the owner of the property to pay. The workman or materialman is a statutory assignee of the property at its inception since the fund includes not only payment but also "the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him" (see last sentence Sec. 36a, Lien Law). It follows that the lienor had the sole beneficial right to payment under the contract at all times when the contract is read in conjunction with New York State law as it existed at the time of its execution.

Respondents therefore submit that Fleetwood Paving Corporation had no beneficial interest in the property concerned, and, therefore, no "property or right to (such) property" within the meaning of the pertinent provisions of the United States Code.

Should this Court deny the motion for reargument, respondents move that the remittitur be amended to certify the Federal question implicit herein to enable respondents to petition the Supreme Court of the United States for a writ of certiorari.

Respondents propose that the Federal question be certified as follows:

That, although under the law of the State of New York respondents have sole interest in the property in question, Federal decision as exemplified by *Kings County Iron Works* v. *New York City Housing Authority*, 224 F. 2d 232 [fol. 120] (Second Circuit, 1955), compel this Court to find that the taxpayer has "property or right to (such) property" within the meaning of United States Code, Title 26, Section 3670, and, therefore, that the Government has a valid tax lien on the property in question.

Respectfully submitted,

Charles S. Friedman, Attorney for Respondents, Aquilino and Spero.

Jacob I. Goodstein, Attorney for Respondent, Colonial Sand and Stone Co., Inc.

Harold M. Edwards, Kenneth Jay Breskin, of Counsel.

[fol. 121]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

JUDGMENT FILED IN SUPREME COURT, WESTCHESTER COUNTY, NEW YORK ON REMITTITUR OF COURT OF APPEALS—
May 22, 1958

Present: George M. Fanelli, Justice.

The defendant, United States of America, having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, Second Department, in the office of the Clerk of the County of Westchester, on the 27th day of August, 1957, affirming the prior order and judgment of this Court heretofore entered herein in the office of the Clerk of the County of [fol. 122] Westchester on March 28, 1955, granting the motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, and denying the cross-motion of defendant, the United States of America for summary judgment; striking out the answers of said defendant, and adjudging that plaintiffs in Action No. 1 have a valid lien for the sum of $1,400.00 against a certain fund, and that the plaintiff in Action No. 2 has a valid lien against said fund for the sum of $896.25, and from each and every part of said order and judgment of affirmance as well as from the whole thereof; and said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that said judgment so appealed from as aforesaid be reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein; and the remittitur from said Court of Appeals having been [fol. 123] filed herein and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now on motion of Paul W. Williams, United States Attorney for the Southern District of New York, Attorney for defendant, United States of America, it is hereby

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Ordered and Adjudged, that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

Ordered and Adjudged, that the said order and judgment entered herein on March 28, 1955, granting the motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, be and the same hereby is reversed and the cross-motion of defendant, United States of America, for summary judgment in each action be and the same is hereby granted; and it is further

[fol. 124] Ordered and Adjudged, that defendant, Fleetwood Paving Corp., is indebted to defendant, United States of America, in the sum of $3,523.41; and it is further

Ordered and Adjudged that, the claim of the defendant, United States of America, is prior to and superior to the claims of plaintiffs and of the other defendants in both actions herein; and it is further

Ordered that, the Commissioner of Finance, Westchester County, pay to the defendant, United States of America, the Two Thousand Two Hundred and no/100 Dollars ($2,200.), plus accrued interest, if any, and less fees allowed by law, which is on deposit with him to the credit of this action, as shown in the certificate of the Commissioner of Finance, Westchester County, attached hereto, in partial satisfaction of the taxes due from Fleetwood Paving Corp. to the United States of America, upon pres-
[fol. 125] entation of two certified copies of this order.

Enter:

George M. Fanelli, J. S. C.

Edward L. Warren, Clerk.

[fol. 126]

SUPREME COURT OF THE UNITED STATES

No. 132, October Term, 1958

ORDER ALLOWING CERTIORARI—Filed February 24, 1959

The petition herein for a writ of certiorari to the Cou
of Appeals of the State of New York is granted; and t
case is transferred to the summary calendar.

And it is further ordered that the duly certified copy
the transcript of the proceedings below which accompani
the petition shall be treated as though filed in response
such writ.

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